Google

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

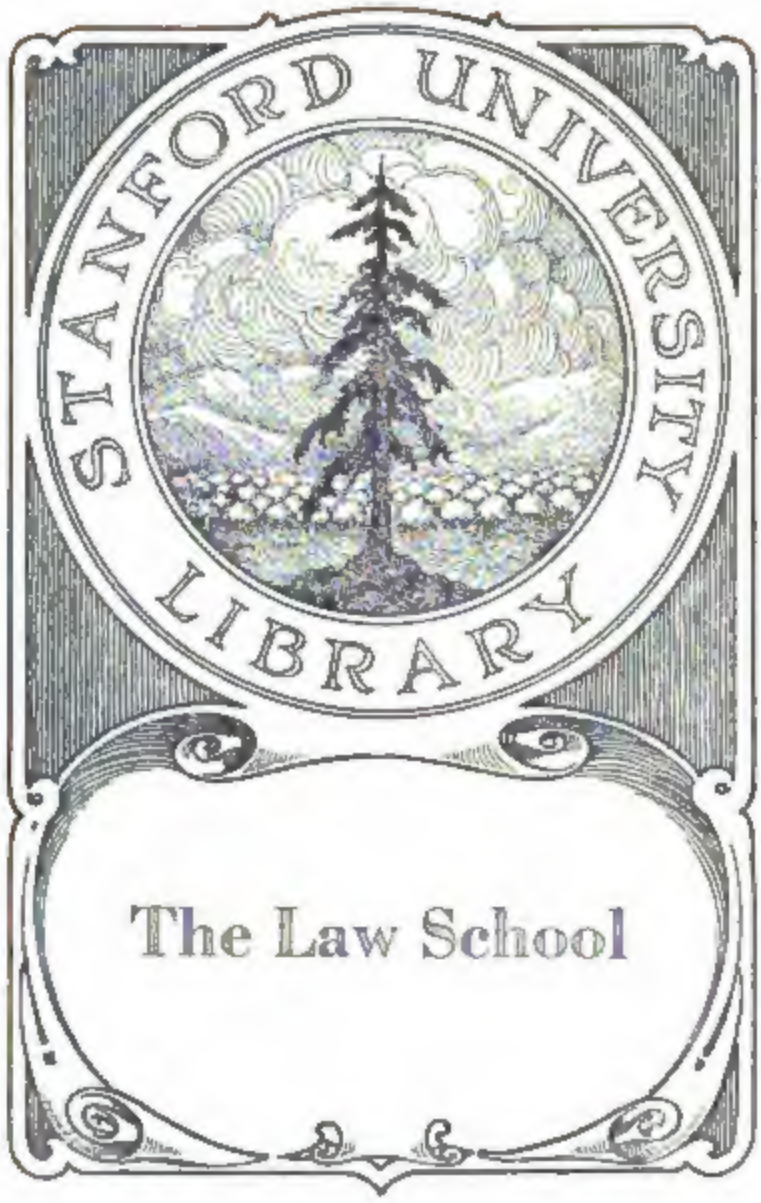
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

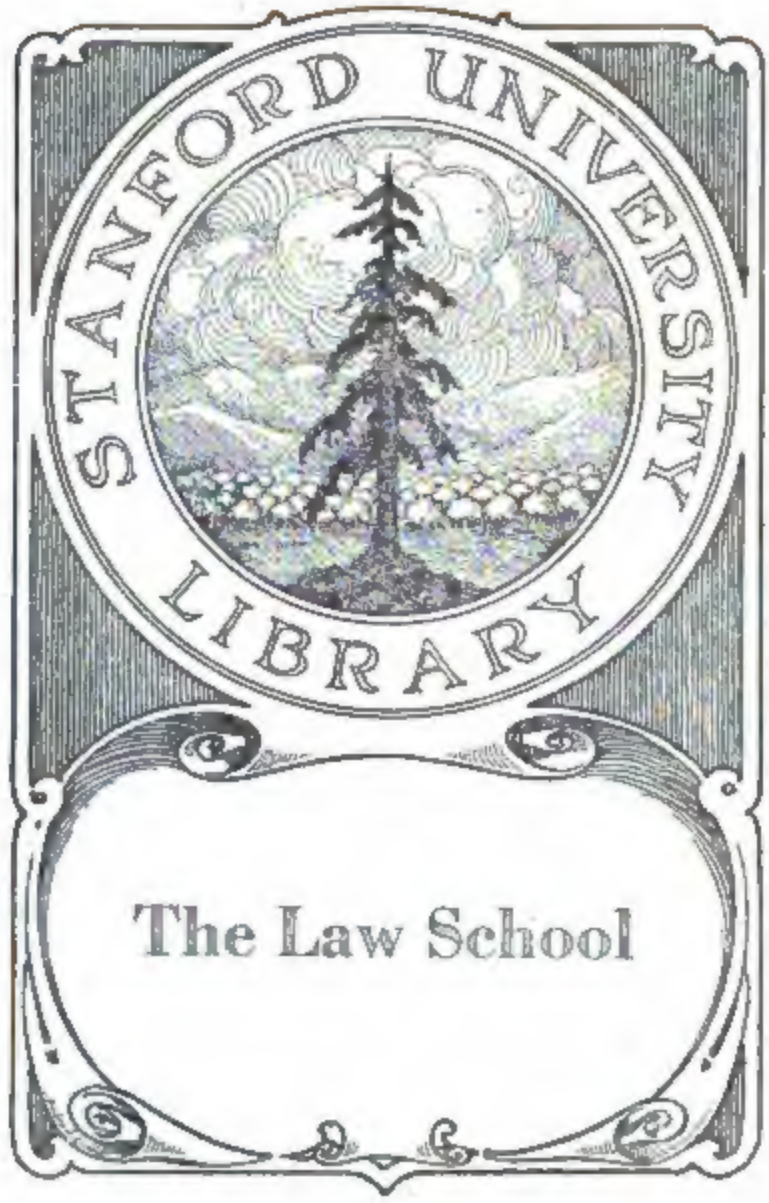
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/



The Law School



The Law School

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

EDITED BY

HON. GEORGE SHARSWOOD.

VOL. LXXXVIII.

CONTAINING

THE CASES DETERMINED IN THE QUEEN'S BENCH, IN HILARY VACATION, EASTER TERM AND VACATION, TRINITY TERM AND VACATION, AND PART OF MICHAELMAS TERM, 1856, 19 & 20 VICT.

PHILADELPHIA:
T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,
NO. 535 CHESTNUT STREET.
1871.

Entered, according to Act of Congress, in the year 1857, by

T. & J. W. JOHNSON & CO.,

in the Clerk's Office of the District Court of the United States, for the Eastern District of Pennsylvania.

STEREOTYPED BY MEARS & DUSENBERY.

359694

STANFORD LIBRARY

REPORTS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF QUEEN'S BENCH,

AND THE

COURT OF EXCHEQUER CHAMBER

ON ERROR FROM THE COURT OF QUEEN'S BENCH.

WITH TABLES OF THE NAMES OF THE CASES ARGUED AND CITED, AND THE PRINCIPAL MATTERS.

BY

THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,

AND

COLIN BLACKBURN, OF THE INNER TEMPLE,

ESQRS., BARRISTERS AT LAW.

VOL. VI.

CONTAINING THE CASES DETERMINED IN HILARY VACATION, EASTER TERM AND VACATION, TRINITY TERM AND VACATION, AND PART OF MICHAELMAS TERM, 1856, XIX. & XX. VICTORIA.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,

NO. 535 CHESTNUT STREET.

1871.

☞ The volumes of Reports to which this mark (†) is annexed have been reprinted by T. & J. W. JOHNSON & Co., at $2.50 per volume, with American Notes and References by Messrs. HARE and WALLACE.

JUDGES

OF

THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. JOHN Lord CAMPBELL, C. J.

Sir JOHN TAYLOR COLERIDGE, Knt.
Sir WILLIAM WIGHTMAN, Knt.
Sir WILLIAM ERLE, Knt.
Sir CHARLES CROMPTON, Knt.

ATTORNEYS-GENERAL.

Sir ALEXANDER JAMES EDMUND COCKBURN, Knt.
Sir RICHARD BETHELL, Knt.

SOLICITORS-GENERAL.

Sir RICHARD BETHELL, Knt.
The Right Hon. JAMES STUART WORTLEY.

A

TABLE

OF

THE NAMES OF THE CASES

REPORTED IN THIS VOLUME.

A.

	PAGE
Andrewes *v.* Elliott	338
Arbitration, Morris's	383
Attwood, Perry *v.*	691
Avery *v.* Bowden	953
Ayscough, Deposit Life Assurance Company *v.*	761

B.

Badger, Regina *v.*	137
Banner, Marquand *v.*	232
Barker *v.* Windle	675
Basterfield *v.* Sprye	376
Bayley, Fitzmaurice *v.*	868
———, Harrup *v.*	218
Bell, Wood *v.*	355
Bennett *v.* Thompson	683
Benson *v.* Paull	273
Besset, Gudgen *v.*	986
Billiter *v.* Young	1
Bilton, Hudson *v.*	565
Bittlestone *v.* Cooke	296
Blake, Mennie *v.*	842
Bowden, Avery *v.*	953
Bowers *v.* Lovekin	584
Bowes *v.* Croll	255
Bramston *v.* Colchester, Mayor of	246
Brass *v.* Maitland	470
Bridge, Reynolds *v.*	528
Butler, Walker *v.*	506

C.

Campbell, Pym *v.*	370
Canterbury, Archbishop of, Regina *v.*	546
Cashill *v.* Wright	891
Chadwick *v.* City of Dublin Steam Packet Company	771
Chamberlayne *v.* Chamberlayne	625
Child, Tozer *v.*	289
City of Dublin Steam Packet Company, Chadwick *v.*	771
Clayton *v.* Fenwick	114
Clifton *v.* Davis	392
Colchester, Mayor of, Bramston *v.*	246
Cooke, Bittlestone *v.*	296
Cooper *v.* Slade	447
Copeland *v.* North Eastern Railway Company	277
Corbett, Douglas *v.*	511
Cottrell, Sloper *v.*	497
Croll, Bowes *v.*	255
Cowie *v.* Stirling	333

D.

PAGE

Davis, Clifton *v.* . . . 392
De Lizardi *v.* Pennell . . 742
Deposit Life Assurance Company *v.* Ayscough . . . 761
Douglas *v.* Corbett . . 511
Duly *v.* Sharwood . . . 830

E.

Eastwood, Regina *v.* . . 285
Eckersley, Hilton *v.* . . 47
Edwards *v.* Wakefield . . 462
Electric Telegraph Company, Reuter *v.* 341
Elliott, Andrewes *v.* . . 338
Ely Local Board of Health, Moseley *v.* 518
Eyre, Regina *v.* . . . 992
Ex parte Metcalfe . . . 287

F.

Fawcus *v.* Sarsfield . . 192
Fazakerley *v.* M'Knight . . 795
Fenn *v.* Green . . . 656
Fenwick, Clayton *v.* . . 114
Fitzmaurice *v.* Bayley . . 868

G.

General Cemetery Company, Regina *v.* 415
Gibb, Pybus *v.* . . . 902
Gill *v.* Jose 718
Gillespie *v.* Thompson . . 477
Grace *v.* Wilmer . . . 982
Great Western Railway Company, Parker *v.* . . 77
———————, Smith *v.* 405
Green, Fenn *v.* . . . 656
Gudgen *v.* Besset . . 986

H.

Haines, Roberts *v.* . . . 643
Halhead *v.* Young . . 312
Hanks *v.* Palling . . . 659

PAGE

Harrup *v.* Bayley . . 218
Hendon, Regent's Canal Company *v.* 852
Hider, Powles *v.* . . 207
Hilary Vacation, Memoranda of 206
Hilton *v.* Eckersley . . 47
Holborn Union, Guardians of, Regina *v.* . . . 715
Hopper, Thompson *v.* . 172, 937
Hoskins, Reid *v.* . . 953
Howitt *v.* Manfull . . . 736
Hudson *v.* Bilton . . 565
Hunt, Regina *v.* . . . 408

J.

Janson, Ralli *v.* . . . 422
Jewel *v.* Stead . . . 350
Job *v.* Langton . . . 779
Jose, Gill *v.* 718
Justice Assurance Society, Palmer *v.* . . . 1015

K.

Kershaw, Regina *v.* . . 999

L.

Langton, Job *v.* . . . 779
Lawes *v.* Purser . . . 930
Lightfoot, Regina *v.* . . 822
Liverpool, Mayor of, *v.* West Derby, Overseers of . . . 704
Lovekin, Bowers *v.* . . 584

M.

Maass, Sieveking *v.* . 312, 670
MacGregor *v.* Rhodes . . 266
Maitland, Brass *v.* . . . 470
Manchester, Guardians of, Regina *v.* 919
Manfull, Howitt *v.* . . 736
Mardall *v.* Thellusson . . 976
Marquand *v.* Banner . . 232
Marvin *v.* Wallis . . 726

	PAGE
Matlock Gas Company *v.* Peters	215
Memoranda of Hilary Vacation	206
——— of Michaelmas Term	901
Memorandum of Trinity Term	794
Mennie *v.* Blake . . .	842
Metcalfe, Ex parte . .	287
M'Knight, Fazakerley *v.* . .	795
Michaelmas Term, Memoranda of	901
Moeller, Young *v.* . .	681
Morris's Arbitration . .	383
Moseley *v.* Ely Local Board of Health	518

N.

North Eastern Railway Company, Copeland *v.* . . .	277

O.

Ogle, Tummons *v.* . .	571

P.

Palling, Hanks *v.* . . .	659
Palmer *v.* Justice Assurance Society	1015
Parker *v.* Great Western Railway Company	77
Paull, Benson *v.* . . .	273
Pellegrini, Russell *v.* . .	1020
Penistone, Waterfall *v.* .	876
Pennell, De Lizardi *v.* . .	742
Perry *v.* Attwood . .	691
Peters, Matlock Gas Company *v.*	215
——, Regina *v.* . . .	225
Poad *v.* Watson . . .	606
Powles *v.* Hider . . .	207
Purser, Lawes *v.* . .	930
Pybus *v.* Gibb . . .	902
Pym *v.* Campbell . .	370

R.

Ralli *v.* Janson . . .	422
Regent's Canal Company *v.* Hendon	852
Regina *v.* Badger . . .	137
Regina *v.* Canterbury, Archbishop of	546
——— *v.* Eastwood . .	285
——— *v.* Eyre . . .	992
——— *v.* General Cemetery Company	415
——— *v.* Holborn Union, Guardians of	715
——— *v.* Hunt . . .	408
——— *v.* Kershaw . .	999
——— *v.* Lightfoot . .	822
——— *v.* Manchester, Guardians of	919
——— *v.* Peters . . .	225
——— *v.* Southwark and Vauxhall Waterworks Company	1008
——— *v.* Spratley . .	363
——— *v.* St. Michaels, Southampton, Churchwardens of	807
——— *v.* Warner . . .	395
——— *v.* Warwickshire, Justices of	837
Regula Generalis . . .	421
Reid *v.* Hoskins . . .	953
Reuter *v.* Electric Telegraph Company	341
Reynolds *v.* Bridge . .	528
Rhodes, MacGregor *v.* . .	266
Roberts *v.* Haines . .	643
Rowbotham *v.* Wilson . .	593
Royal British Bank *v.* Turquand	327
Russell *v.* Pellegrini . .	1020

S.

Sarsfield, Fawcus *v.* . .	192
Sharwood, Duly *v.* . .	830
Sieveking *v.* Maass . . 312,	670
Slade, Cooper *v.* . . .	447
Sloper *v.* Cottrell . . .	497
Smith *v.* Great Western Railway Company	405
——, Tyerman *v.* . . .	719
Southwark and Vauxhall Water Company, Regina *v.* .	1008
Spratley, Regina *v.* . .	363
Spryc, Basterfield *v.* . .	376
Stead, Jewel *v.* . . .	350

	PAGE
Stirling, Cowie *v.*	333
Saint Michaels, Southampton, Churchwardens of, Regina *v.*	807

T.

Taylor *v.* Wakefield	765
Temperley *v.* Willett	380
Thellusson, Mardall *v.*	976
Thompson, Bennett *v.*	683
———, Gillespie *v.*	477
——— *v.* Hopper	172, 937
Tozer *v.* Child	289
Trinity Term, Memorandum of	794
Tummons *v.* Ogle	571
Turquand, Royal British Bank *v.*	327
Tyerman *v.* Smith	719

W.

Wakefield, Edwards *v.*	462
———, Taylor *v.*	765
Walker *v.* Butler	506
Wallis, Marvin *v.*	726
Warner, Regina *v.*	395
Warwickshire, Justices of, Regina *v.*	837
Waterfall *v.* Penistone	876
Watson, Poad *v.*	606
Webster, Wickenden *v.*	387
West Derby, Mayor of, Overseers of Liverpool *v.*	704
Wickenden *v.* Webster	387
Willett, Temperley *v.*	380
Wilmer, Grace *v.*	982
Wilson, Rowbotham *v.*	593
Wood *v.* Bell	355
Windle, Barker *v.*	675
Wright, Cashill *v.*	891

Y.

Young, Billiter *v.*	1
———, Halhead *v.*	312
——— *v.* Moeller	681

TABLE OF CASES CITED.

A.

		PAGE
Acland *v.* Pring	2 M. & G. 937	618
Adcock *v.* Fiske	6 New Ca. 17	377
Allen *v.* Hearn	1 T. R. 56	454
Andrewes *v.* Elliott	Ante, p. 338	722
——— *v.* ———	5 E. & B. 502	722
Annen *v.* Woodman	3 Taunt. 299	198
Anonymous Case	Moore, 78, pl. 207	894
Archer *v.* Baynes	5 Exch. 625	873
Archer's Case	1 Rep. 66 *a*	630
Archer *v.* Hale	5 Bing. 485	909
Arding *v.* Holner	1 H. & N. 85	378
Armistead *v.* Wilde	17 Q. B. 261	893
Austin *v.* Manchester, &c., Railway Company	10 Com. B. 454, 474	897
Ashby *v.* Ashby	7 B. & C. 444, 451	980
——— *v.* White	2 Ld. Raym. 938	295
Astley *v.* Weldon	2 B. & P. 346	358
Atkyns *v.* Kinnier	4 Exch. 776	536
Attorney-General *v.* Birmingham and Derby Junction Railway Company	2 Railway Cases, 124	101
——— *v.* Corporation of London	11 Exch. 543	467
Armani *v.* Castrique	13 M. & W. 443	268
Avery *v.* Bowden	5 E. & B. 714	969
——— *v.* Scott	8 Exch. 497	1026

B.

Bailey *v.* Merrell	3 Bulst. 94	479
Baker *v.* Gray	17 Com. B. 462	359
Ball *v.* Harris	4 Myl. & C. 264	616
Balme *v.* Hutton	9 Bing. 486	30
Bank of England *v.* Anderson	3 New Ca. 589, 662	818
Banor *v.* Macdonald	3 H. L. Ca. 226, 236	909
Barclay *v.* Cousins	2 East, 544	318
——— Ex parte	3 De G. M. & G. 403, 410	884
Barnett *v.* Brandao	6 M. & G. 630	198

		PAGE
Barlar *v.* Richards	6 Exch. 63	372
Batson *v.* Donovan	4 B. & Ald. 21	896
Baxter *v.* Pritchard	1 A. & E. 456	506
Bayley's Case	3 E. & B. 607	592
Bayntun *v.* Cattle	1 Moo. & R. 265	452
Beaumont *v.* Brengeri	5 Com. B. 301	732
Beck *v.* Evans	16 East, 245	479
Beckham *v.* Drake	8 M. & W. 846	535
——— *v.* ———	2 H. L. Ca. 579	535
Bell *v.* Carstairs	14 East, 374	177, 950
—— *v.* Lord Ingestrie	12 Q. B. 317	372
Benthall *v.* West	1 D. & L. 599	657
Bennett *v.* Daniel	10 B. & C. 300	20
——— *v.* Mellor	5 T. R. 273	894
Benson *v.* Chapman	8 Com. B. 950. S. C., 2 H. L. Ca. 696	783
——— *v.* ———	6 M. & G. 792	783
Bermon *v.* Woodbridge	2 Doug. 781	198
Berwick, Mayor of, *v.* Oswald	3 E. & B. 653	907
——— *v.* ———	1 E. & B. 295	907
Biffin *v.* Yorke	5 M. & G. 428	45
Bird *v.* Peagrum	13 Com. B. 639	505
Birkenhead Dock Trustees *v.* Birkenhead Overseers	2 E. & B. 148	712
Birkley *v.* Presgrave	1 East, 220, 228	783
Bishop of Hereford *v.* T——	2 Robertson's Ecc. Ca. 595	550
——— *v.* Elliott	11 Exch. 113	888
——— *v.* Pentland	7 B. & C. 219	177, 948
Blagrave *v.* Blagrave	4 Exch. 550	616
Blakesley *v.* Smallwood	8 Q. B. 538	980
Blenkinsop *v.* Clayton	7 Taunt. 597	728
Bodley *v.* Reynolds	8 Q. B. 779	359
Bombey *v.* Frazier	1 Stra. 441	267
Bonar *v.* Macdonald	3 H. L. Ca. 226	913
Boodle *v.* Davies	3 A. & E. 200	216
Boorman *v.* Brown	3 Q. B. 511	275
Boucher *v.* Lawson	Ca. temp. Hard. 85, 194	244
Bourne *v.* Seymour	16 Com. B. 337, 342	318
Bowker *v.* Bundakin	11 M. & W. 121, 147	989
Bowman *v.* Taylor	2 A. & E. 278	932
Boydell *v.* Drummond	11 East, 142	872
——— *v.* M'Michael	1 C. M. & R. 177	888
Braddick *v.* Thompson	8 East, 344	723
Brandao *v.* Barnett	12 Cl. & F. 787. S. C., 3 Com B. 519	198
——— *v.* ———	6 M. & G. 630	198
Bremridge *v.* Campbell	5 Car. & P. 186	452
Brewster *v.* Hidgill	12 Mod. 166	599
——— *v.* Kitchin	1 Ld. Raym. 317, 322	599
Bridges *v.* Fisher	1 New Ca. 510	407
Brind *v.* Hampshire	1 M. & W. 365	758
Britten *v.* Webb	2 B. & C. 483	267
Brodie *v.* St. Paul	1 Ves. Jun. 326	372
Brook *v.* Mitchell	6 New Ca. 349	14
Brown *v.* Edgington	2 M. & G. 279	476

		PAGE
Bruce *v.* Willis	11 A. & E. 463	865
Burchfield *v.* Moore	3 E. & B. 683	799
Burgess *v.* Clements	4 M. & G. 306	895
Burley's Case	2 Vent. 230	636
Burn *v.* Boulton	2 Com. B. 476	507
Burnes *v.* Pennell	2 H. L. Ca. 497, 522	762
Bush *v.* Royal Exchange Assurance Company	2 B. & Ald. 73, 177	948

C.

Cadogan *v.* London Assurance Company	5 M. & S. 447	435
Calland *v.* Lloyd	6 M. & W. 26	501
Callander *v.* Howard	10 Com. B. 290	701
Cayle's Case	8 Rep. 32 *a*	894
Cambridge *v.* Anderton	2 B. & C. 691	203
Carter *v.* Boehm	3 Burr. 1905, 1910	479
Carter *v.* Toussaint	5 B. & Ald. 855	728
Chamberlain Ex parte	1 Sch. & Lef. 320	845
Chanter *v.* Dewhurst	12 M. & W. 823	933
——— *v.* Leese	4 M. & W. 295	932
Chapman *v.* Benson	5 Com. B. 330	783
Charleton *v.* Watson	3 Q. B. 693	802
Chawner *v.* Cummings	8 Q. B. 311	589
Chelsea Waterworks Company *v.* Bowley	17 Q. B. 358	1012
Chittenden *v.* Walker	3 A. & E. 691	216
Christie *v.* Secretan	8 T. R. 192, 198	195
Cross *v.* Eglin	2 B. & Ad. 106	678
Clarke *v.* Spence	4 A. & E. 448	358
Clerk *v.* Day	Cro. Eliz. 313	635
Clinan *v.* Cooke	1 Sch. & Lef. 22	872
Clipsham *v.* Vertue	5 Q. B. 265	679
Collins *v.* Blantern	2 Wils. 341	330
Colvin *v.* Newberry	1 Cl. & F. 283	243
——— *v.* ———	8 B. & C. 167	243
Copeland *v.* North Eastern Railway Company	Ante, p. 277	418
Copper Miners' Company *v.* Fox	16 Q. B. 229, 236	348
Cordal's Case	Cro. Eliz. 315	620
Corder *v.* Universal Gaslight Company	6 Com. B. 190	1017
Cort *v.* Ambergate, &c., Railway Company	17 Q. B. 127	961
Cospey *v.* Turner	Cro. Eliz. 800	802
Cotton, Ex parte	2 Mont. D. & De G. 725	888
Crake *v.* Powell	2 E. & B. 210	551
Critchlow *v.* Parry	2 Camp. 182	207
Croft *v.* Lumley	5 E. & B. 648, 682	7
Crouch *v.* London and North Western Railway Company	14 Com. B. 255	476
Cuthbert *v.* Cumming	11 Exch. 405	198
——— *v.* ———	10 Exch. 809	198
Cutler *v.* Bower	11 Q. B. 973	932
Cutts *v.* Surrige	4 Dow. & L. 373	983
Cuxon *v.* Chadley	3 B. & C. 591	569

D.

		PAGE
Daniel *v.* Saunders	2 Chitt. 564	800
Darrant *v.* Boys	6 T. R. 580	292
Davaux *v.* J'Anson	5 New Ca. 519	320
Davidson *v.* Cooper	13 M. & W. 343	799
——— *v.* ———	11 M. & W. 778	799
Davis *v.* Garrett	6 Bing. 716	948
——— *v.* Jones	17 Com. B. 625	372
——— *v.* Oswell	7 Car. & P. 804	799
Davy *v.* Milford	15 East, 559	431
Denn dem. Gurney *v.* Shenton	Cowper, 410	639
——— Manifold *v.* Diamond	4 B. & C. 243	282
——— *v.* Puckey	5 T. R. 299	637
Denison, Ex parte	4 E. & B. 292	348
De Vaux *v.* Salvador	4 A. & E. 420	377
Dickson *v.* Baker	1 A. & E. 853	377
Dillon *v.* Edwards	2 M. & P. 550	45
Dixon *v.* Sadler	5 M. & W. 405	181, 948
Dobell *v.* Hutchinson	3 A. & E. 355	668, 872
Doe dem. Grimsby *v.* Ball	11 M. & W. 531	17
——— Mitchinson *v.* Carter	8 T. R. 300	7
——— Mueller *v.* Claridge	6 Com. B. 641	613
——— Davies *v.* Davies	1 Q. B. 630	614
——— Shelley *v.* Edlin	7 A. & E. 582, 592	623
——— Cadogan *v.* Ewart	7 A. & E. 636, 669	614
——— Todd *v.* Duesbury	8 M. & W. 514	639
——— Compere *v.* Hicks	7 T. R. 433	613
——— Madkins *v.* Homer	8 A. & E. 235	721
——— Jones *v.* Hughes	6 Exch. 223	614
——— Bush *v.* Keeling	1 M. & S. 95	389
——— White *v.* Simpson	5 East, 162	619
——— Buverman *v.* Syborne	7 T. R. 2	621
——— Tomkyns *v.* Willan	2 B. & Ald. 84	619
——— The Queen *v.* York (Archbishop of)	14 Q. B. 81	865
Dore *v.* Wilkinson	2 Stark. N. P. C. 287	848
Douglas *v.* Congreve	1 Keen, 410, 423	501
——— *v.* Scougall	4 Dow. 269	202
Drake *v.* Beckham	11 M. & W. 315	535
Drury *v.* Scott	4 Yo. & C. 261	501
Dubber *v.* Trollope	Ambl. 453	637
Dudley Canal Navigation Company *v.* Grazebrook	1 B. & Ad. 59	651
Duff *v.* Budd	3 Br. & B. 177	896
Duncan *v.* Benson	1 Exch. 537	786
Dyson *v.* Rowcroft	3 B. & P. 474	441

E.

East Anglian Railway Company *v.* Eastern Counties Railway Company	11 Com. B. 775	330
East *v.* Twyford	4 H. L. Ca. 517	636
Edan *v.* Dudfield	1 Q. B. 302	767

		PAGE
Edwards *v.* Cameron's Railway Company	15 Jurist, 470	1017
Egerton *v.* Earl Brownlow	4 H. L. Ca. 1	64
Ellershaw *v.* Magniac	6 Exch. 570 (note)	359
Elliott *v.* Bishop	10 Exch. 496	888
Elmer *v.* Norwich Local Board of Health	3 E. & B. 517	522
Elmore *v.* Stone	1 Taunt. 458	728
Evans *v.* Elliott	5 A. & E. 142	844
—— *v.* Whyle	5 Bing. 485	909
Eyre *v.* Bartrop	3 Madd. 221	909
—— *v.* Glover	16 East, 220	321

F.

Faith *v.* East India Company	4 B. & Ald. 630	241
Farber *v.* Chesterton	2 Moore, P. C. 330	291
Farnworth *v.* Packwood	1 Stark. N. P. C. 251	895
Fenton *v.* City of Dublin Steam Packet Company	8 A. & E. 835	243
Fisher *v.* Dixon	12 Cl. & F. 312, 320	888
Flight *v.* Booth	1 N. Ca. 370, 377	678
Flitcroft *v.* Fletcher	11 Exch. 543	466
Flureau *v.* Thornhill	2 W. Bl. 1078	360
Forth *v.* Chapman	1 P. Wms. 663	640
Free *v.* Hawkins	Holt's N. P. R. 550	267

G.

Galloway *v.* Bird	4 Bing. 299	844
Galsworthy *v.* Strut	1 Exch. 659	535
George *v.* Chambers	11 M. & W. 149	844
Gibson *v.* Small	4 H. L. Ca. 353	177
Gillespie *v.* Thompson	April 25th, 1856	477
Glaholm *v.* Hays	2 M. & G. 257	678
Glennie *v.* London Assurance Company	2 M. & S. 447	442
Goodright *v.* Pullyn	2 Ld. Raym. 1437	637
Goodtitle *v.* Herring	1 East, 264	636
Goss *v.* Quinton	3 M. & G. 825	362
Graham *v.* Ackroyd	10 Hare, 192	802
Graham *v.* Birkenhead and Cheshire Junction Railway Company	2 Macn. & G. 146	223
Graham *v.* Chapman	12 Com. B. 85	304
Graves *v.* Legg	9 Exch. 709	679
Green *v.* Price	13 M. & M. 695	535
Greenwood's Case	3 De G. Macn. & G. 459	333
Gregory's Case	6 Rep. 19 B.	251
Gribble *v.* Buchanan	18 Com. B. 691	217
Griffin *v.* Ellis	11 A. & E. 743, 756	292

H.

Hall *v.* Janson	4 E. & B. 500	787

		PAGE
Hallett *v.* Wigram	9 Com. B. 580	785
Hallifax *v.* Lyle	3 Exch. 446	272
Hamilton *v.* Spottiswood	4 Exch. 200	567
Hamlin *v.* Crossley	8 A. & E. 677	377
Hanson *v.* Epsom Local Board of Health	5 E. & B. 599	522
Harrhy *v.* Wall	1 B. & Ald. 103	799
Harris *v.* Ryding	5 M. & W. 60	603, 649
Hart *v.* Nash	2 C. M. & R. 337	820
Harton *v.* Harton	7 T. R. 652	613
Hawker *v.* Hawker	3 B. & Ald. 537	619
Hayne *v.* Maltby	3 T. R. 438	931
Haywood *v.* Rodgers	4 East, 591	198
Head *v.* Sanders	4 Moore's P. C. C. 186	550
Hedburg *v.* Pearson	7 Taunt. 154. S. C., 2 Marshall, 432	433
Hellawell *v.* Eastwood	6 Exch.	884
Henderson *v.* Australian Royal Mail Steam Navigation Company	5 E. & B. 509	846
Heylyn *v.* Adamson	2 Burr. 669, 675	267
Heyman *v.* Parish	11 Peters' Rep. (U. S.) 213, 219	948
Hibblewhite *v.* M'Morine	6 M. & W. 200	799
Hill *v.* Philp	7 Exch. 232	406
—— *v.* Manchester and Salford Water Works Company	2 B. & Ad. 544	331
Hills *v.* London Assurance Company	1 H. & N. 398	1019
—— *v.* London Assurance Corporation	5 M. & W. 569	436
Hilton *v.* Earl Granville	5 Q. B. 701, 710	318
Hinton *v.* Dibbin	2 Q. B. 646, 661	897
Hitchcock *v.* Coker	6 A. & E. 438	59
Hobbs *v.* Hannam	3 Camp. 93	243
Hochster *v.* De La Tour	2 E. & B. 678	961
Hodgson *v.* Anderson	3 B. & C. 842	567, 756
Holdsworth *v.* Wise	7 B. & C. 794	198
Hollingworth *v.* Brodrick	7 A. & E. 40	179
Holmes *v.* Hoskins	9 Exch. 753	729
Hooper *v.* Stevens	4 A. & E. 71	820
Horncastle *v.* Stuart	6 T. R. 478	319
Horner *v.* Flintoff	9 M. & W. 678	535
Horton *v.* Westminster Improvement Commissioners	7 Exch. 780	331
Howard *v.* Shepherd	9 Com. B. 297	198
——— *v.* Tucker	1 B. & Ad. 712	242
Howe *v.* Palmer	3 B. & Ald. 321	730
Hucks *v.* Thornton	5 Bing. 368	799
Hudson *v.* Revett	Holt's N. P. C. 30	179
Hughes *v.* Marshall	2 Cr. & J. 118	452
Humphreys *v.* Jones	5 Exch. 952	261
Humphries *v.* Brogden	12 Q. B. 739	597, 649
Hunlocke *v.* Blacklowe	2 Wms. Saund. 156 *a*	73
Hunter *v.* Fry	2 B. & Ald. 424	677
Huntingtower *v.* Gardiner	1 B. & C. 297	459
Hutchins *v.* Chambers	1 Burr. 579, 580	292
Hutton *v.* Bragg	7 Taunt. 14	244
——— *v.* Crutwell	1 E. & B. 15	306
——— *v.* Warren	1 M. & W. 466	198

I. & J.

		PAGE
Ingram *v.* Barnes	Hil. T. 1857	592
Ivy *v.* Kekewich	2 Ves. 679	465
Jackson *v.* Charnock	8 T. R. 509	784
——— *v.* Hanson	8 M. & W. 477	578
——— *v.* Lowe	1 Bing. 9	873
——— *v.* Thompson	2 Q. B. 887	16
James *v.* Jones	3 Esp. N. P. C. 27	243
Jeffrey's Case	5 Rep. 66 *a*, 67 B.	1003
Jenkins *v.* Heycock	6 Moore's P. C. Ca. 351	190
Jones *v.* Barkley	2 Doug. 684	970
—— *v.* Fort	9 B. & C. 764	10
Jones, Lady *v.* Say and Seal, Lord	8 Vin. Abr. *Devise* (C. B. 19)	613

K.

Kemble *v.* Farren	6 Bing. 141	535
Kemp *v.* Sober	1 Sim. N. S. 517	389
Kendil *v.* Merrett	18 Com. B. 173	721
Kenrick *v.* Beauclerk, Lord W.	3 B. & P. 175	614
Kent *v.* Shuchard	2 B. & Ad. 803	895
Keppell *v.* Bailey	2 Myl. & K. 517	598
King *v.* Gillett	7 M. & W. 55	961
—— *v.* Glover	2 New R. 206	323
—— *v.* Melling	2 Vent. 275	636
Kingsbridge Flour Mill Company *v.* Plymouth Grinding and Baking Company	2 Exch. 718	330
Knight *v.* Fox	5 Exch. 721	211
Knox *v.* Wood	1 Camp. 543	322

L.

Laidler *v.* Burlinson	2 M. & W. 602	358
Lake *v.* Butler	5 E. & B. 92	353
—— *v.* Hayes	1 Atk. 281	267
Lambert *v.* Pack	1 Salk. 127	267
Lancaster *v.* Greaves	9 B. & C. 628	152
Langhorn *v.* Hardy	4 Taunt. 628	321
Leake *v.* Young	3 E. & B. 935	305
Lechmere *v.* Fletcher	1 C. R. & M. 623	510
Lee *v.* Hart	10 Exch. 555	305
Lewis *v.* Holding	2 M. & G. 875	394
—— *v.* Rucker	2 Burr. 1167	430
Lillywhite *v.* Devereux	15 M. & W. 285	767
Liverpool, Mayor of, *v.* Manchester Overseers of	17 Q. B. 859	711
Livie *v.* Janson	12 East, 648	948
Livingstone *v.* Whiting	15 Q. B. 722	728
Lloyd *v.* Howard	15 Q. B. 995	372
Lothian *v.* Henderson	3 B. & P. 499, 515	679
Low *v.* Piers	Wilmot's Notes, 364, in Ex. Ch.	72
Lowe *v.* Davies	2 Ld. Raym. 1561	631
—— *v.* Piers	4 Burr. 2225	72

		PAGE
Luddington *v.* Kime	1 Ld. Raym. 203	635
Lyn *v.* Wyn	Bridgman, 122, 127	251

M.

Mac Carthy *v.* Nepean	6 Q. B. 252	394
Mackenzie *v.* Rowe	2 Camp. 482	243
Mackey, In re, Morrisson, Ex parte	2 Mont. D. & De Gex, 136	755
Maclean *v.* Dunn	4 Bing. 722	873
M'Kellar *v.* Wallace	8 Moore's P. C. 378, 401	700
M'Sweney *v.* Royal Exchange Assurance	14 Q. B. 634	319
Major *v.* White	7 C. & P. 41	244
Mallan *v.* May	11 M. & W. 653	59
Manning's Case	8 Rep. 94 B, 96 A.	620
Mardall *v.* Thellusson	18 Q. B. 857	978
Marston *v.* Allen	8 M. & W. 404	372
Martin *v.* Pewtress	4 Burr. 2477	32
Marvin *v.* Wallis	Ante, p. 726	767
Mather *v.* Fraser	2 K. & J. 536	885
Matthews *v.* Taylor	2 Man. & G. 673	807
Mellor *v.* Leather	1 E. & B. 619	844
Michael *v.* Fredwin	17 Com. B. 551	198
Mitchell *v.* Reynolds	1 P. Wms. 186	68
Mitchel *v.* Scaife	4 Camp. 298	241
Moeller *v.* Young	5 E. & B. 7	682
Molony *v.* Kennedy	10 Sim. 254	501
Montoya *v.* London Assurance Company	6 Exch. 451	948
Moon *v.* Raphael	2 New Ca. 310	360
Morisse *v.* Royal British Bank	1 C. B. N. S. 67	1019
Morley *v.* Duncombe	11 Law Times, 199	210
Mornsey *v.* Watson	7 B. & C. 683	983
Mucklow *v.* Mangles	1 Taunt. 318	358
Murray *v.* Stair, Earl of	2 B. & C. 82	988

N.

Nash *v.* Coates	3 B. & Ad. 839	637
Nash *v.* Hodgson	1 Kay, 650	507
Navone *v.* Haddon	9 Com. B. 30	438
Newberry *v.* Colvin	7 Bing. 190, S. C. 1 Cr. & J. 192	243
Newnham *v.* Stevenson	10 Com. B. 713	32
Newry and Enniskillen Railway *v.* Coombe	3 Exch. 565	762
Nicholson *v.* Gooch	5 E. & B. 999	10
——— *v.* Nichols	3 Dowl. P. C. 326	377
Nightingale *v.* Adams	1 Shower, 91	845
Nixon *v.* Jenkins	2 H. Bl. 135	10
North *v.* Wakefield	13 Q. B. 536	800

O.

Ogilvie *v.* Foljambe	3 Mer. 53	873
Oliver *v.* Fielden	4 Exch. 135	679
Ollive *v.* Booker	1 Exch. 416	678

		PAGE
Oswald *v.* Berwick-upon-Tweed, Mayor, Aldermen and Burgesses of	5 H. L. Ca. 856	907
Owen *v.* De Beauvoir	16 M. & W. 517	668

P.

Paddock *v.* Franklin Insurance Company	11 Pickering (Massachusetts) 227	181
Panton *v.* Williams	2 Q. B. 169	514
Parfitt *v.* Thompson	2 Doug. 781	198
Parish *v.* Crawford	2 Stra. 1251	242
Parker *v.* Great Western Railway Company	7 M. & G. 253	100
—— *v.* ——	11 Com. B. 545	100
Parker *v.* Wallis	5 E. & B. 21	729
Paxton *v.* Popham	9 East, 408	330
Payler *v.* Homersham	4 M. & S. 423	802
Pennell *v.* Walker	18 Com. B. 651	1024
Penny *v.* Innes	1 C. M. & R. 439	269
Perveau *v.* Bevan	5 B. & C. 284	578
Pickard *v.* Sears	6 A. & E. 469	725
Pickford *v.* Grand Junction Railway Company	10 M. & W. 399	100
Piggott *v.* Bearblock	4 Moore, P. C. 899	817
Pigot's Case	11 Rep. 26 *b*	798
Pitchou *v.* Sheriff of Monmouth	2 Marsh, 152	982
Pitman *v.* Woodbury	3 Exch. 4	261
Plummer *v.* Wildman	3 M. & S. 482	784
Pool *v.* Singuevill	2 Wms. Saund. 285	845
Power *v.* Whitmore	4 M. & S. 141, 149	184
Price *v.* Green	16 M. & W. 346	535
Pye *v.* Leigh	2 W. Bl. 1061	982
Pym *v.* Campbell	Ante, p. 370	988

Q.

Quarman *v.* Burnett	6 M. & W. 499	211

R.

Rackham *v.* Siddall	1 Macn. & G. 607, 615	622
Randal *v.* Everest	Moo. & M. 41	535
Redman *v.* Wilson	14 M. & W. 476	198, 948
Rees *v.* Watts	11 Exch. 410	978
Regina *v.* Archbishop of Canterbury	11 Q. B. 483	551
—— *v.* Badcock	6 Q. B. 787	711, 866
—— *v.* Bolton	1 Q. B. 66	150
—— *v.* Chaney	6 Dowl. P. C. 281	152
—— *v.* Colling	17 Q. B. 816	292
—— *v.* East London Waterworks Company	18 Q. B. 705	1011
—— *v.* Exminster	12 A. & E. 2	712
—— *v.* Eyre	7 E. & B.	999
—— *v.* Grant	14 Q. B. 42	723

		PAGE
Regina *v.* Gregory	1 E. & B. 600	367
——— *v.* Hammond	17 Q. B. 772	366
——— *v.* Harris	Car. & M. 661, note (*a*)	60
——— *v.* Harrogate Commissioners	15 Q. B. 1012	711
——— *v.* Hull, Recorder of	9 A. & E. 638	835
——— *v.* Justices of Hull	4 E. & B. 29	711
——— *v.* ——— London	9 Q. B. 41	996
——— *v.* Kentmere	17 Q. B. 551	711
——— *v.* Lingwood	13 Q. B. 116	711
——— *v.* Mayor, &c., of Liverpool	9 A. & E. 435	712
——— *v.* Mayor of New Sarum	2 E. & B. 654	251
——— *v.* Midland Railway Company	4 E. & B. 958	1011
——— *v.* Mile End Old Town	10 Q. B. 208, 210	704
——— *v.* Overseers of Lugwood	17 Q. B. 871	711
——— *v.* Raines	1 E. & B. 855	580
——— *v.* Rowlands	17 Q. B. 671, note (*b*)	61
——— *v.* Selsby	Note (*a*) to Rowland's Case, 2 Den. C. C. R. 384	70
——— *v.* St. George, Bloomsbury	4 E. & B. 520	716
——— *v.* Thwaites	1 E. & B. 704	367
——— *v.* Worthing Road Trustees	3 E. & B. 989	522
Reid *v.* Fairbanks	13 Com. B. 692	359
—— *v.* Hoskins	5 E. & B. 729	958
—— *v.* ———	4 E. & B. 979	958
Reniger *v.* Fogossa	Plowd. 1, 9	893
Rex *v.* Barnby Dun	2 A. & E. 551	866
—— *v.* Carpenter	6 A. & E. 794	815
—— *v.* Castelman	4 Burr. 2127	378
—— *v.* Chandler	1 Ld. Raym. 581	149
—— *v.* Chelsea Waterworks Company	5 B. & Ad. 156	865
—— *v.* Churchwardens and Overseers of St. Martin in the Fields	3 B. & Ad. 907	231
—— *v.* Dobson	7 East, 218	151
—— *v.* Dudley Canal Company	7 Dowl. & R. 466	866
—— *v.* Dursley	5 A. & E. 10	817
—— *v.* Grand Junction Canal Company	1 B. & Ad. 280, 295	866
—— *v.* Hill	7 Price, 636	722
—— *v.* Hulcott	6 T. R. 583	69
—— *v.* Jones	In Regina *v.* Selsby note (*a*) to Rowland's Case, 2 Den. C. C. R. 384	60
—— *v.* Journeyman Tailors of Cambridge	8 Mod. 11	69
—— *v.* Jukes	8 T. R. 542	410
—— *v.* Liverpool	7 B. & C. 61	712
—— *v.* Lloyd	2 Stra. 996	149
—— *v.* Loxdale	1 Burr. 445, 447	817
—— *v.* Mawbey	6 T. R. 619, 636	53
—— *v.* Mersey and Irwell Navigation Company	9 B. & C. 95	865
—— *v.* Paddington Vestry	9 B. & C. 456	550
—— *v.* Sillifant	4 A. & E. 361	294
—— *v.* St. Mary, Lambeth	3 B. & Ad. 651	814
—— *v.* Wear Navigation	7 B. & C. 70, note (*c*)	713
Richards *v.* Bergavenny	2 Vern. 324	636
——— *v.* Porter	6 B. & C. 437	873
Richmond *v.* Smith	8 B. & C. 9	896

		PAGE
Ridley *v.* Plymouth Grinding and Baking Company	2 Exch. 711	330
Riley *v.* Warden	2 Exch. 59	589
Roberts *v.* Haines	Post, p. 643	597
Robertson *v.* French	1 Sim. N. S. 517	390
Robinson *v.* Lavater	17 Beav. 592	619
——— *v.* Musgrove	10 Q. B. 704, 710	3.8
Robson *v.* Oliver	2 Moo. & R. 92	667
Rose *v.* Haycock	1 A. & E. 460, note (*a*)	311
Rosetta *v.* Gurney	11 Com. B. 176	785
Routledge *v.* Abbott	8 A. & E. 592	394
Rowbotham *v.* Wilson	Ante, p. 593	651
Rowland's Case	2 Den. C. C. R. 389, note (*a*)	61
Royal British Bank *v.* Turquand	5 E. & B. 248	329
—— Exchange Assurance *v.* M'Sweney	14 Q. B. 646	319
Rust *v.* Cooper	2 Cowp. 629	33

S.

Sadler *v.* Dixon	8 M. & W. 895	179
Sanderson *v.* Collman	4 M. & G. 209	268
Sanguy *v.* Hobson	2 B. & C. 7	785
Saunderson *v.* Jackson	2 B. & P. 238	873
Say and Seal, Lord, *v.* Jones	3 Bro. P. C. 113	618
Scott *v.* Avery	5 H. L. Ca. 811	1026
—— *v.* ———	8 Exch. 487	1026
Shannon *v.* Shannon	1 Sch. & Lef. 324	845
Shapland *v.* Smith	1 Bro. C. C. 74	618
Sharman *v.* Sanders	13 Com. B. 166	589
Sharpe *v.* Thomas	6 Bing. 416	7
Shaw *v.* Weight	2 Strange, 798	635
Shepherd *v.* Pybus	3 M. & G. 868	476
Shipman *v.* Thompson	Willes, 103	979
Shippey *v.* Derrison	3 Esp. N. P. C. 190	873
Sibbald *v.* Roderick	11 A. & E. 38	403
Silvester dem. Law *v.* Wilson	2 T. R. 444	613
Six Carpenters' Case	8 Rep. 146 *a*	844
Slopper *v.* Stidstone	5 T. R. 493	979
Small *v.* Gibson	16 Q. B. 141	177
—— *v.* ———	16 Q. B. 128	177
Smart *v.* Morton	3 E. & B. 30, 47	600
Smith *v.* Cannan	2 E. & B. 35	304
—— *v.* Hull Glass Company	11 Com. B. 897	330, 846
—— *v.* Page	15 M. & W. 683	699
Soames *v.* Spencer	1 Dowl. & R. 32	873
Soares *v.* Thornton	7 Taunt. 627	243
Solomon *v.* Graham	5 E. & B. 309, 315, 316	378
Soprana *v.* Skurro	Yelv. 18	261
Spencer's Case	5 Rep. 16 A.	598
Spitta *v.* Woodman	2 Taunt. 416	321
Spratt *v.* Jeffery	4 B. & C. 249	666
Stanley *v.* Lennard	Ambler, 355	640
Stevenson *v.* Newnham	13 C. B. 285	10
Stockdale *v.* Dunlop	6 M. & W. 232	321
Storm *v.* Stirling	3 E. & B. 832	335

		PAGE
Stronghill *v.* Buck	14 Q. B. 785	932
Sunderland Marine Insurance Company *v.* Kearney	16 Q. B. 925	568
Swatman *v.* Ambler	8 Exch. 72	259

T.

Target *v.* Gaunt	1 P. Wms. 431	640
Tate *v.* Meek	8 Taunt. 280	242
Tawney *v.* Crowther	3 Bro. Ch. Ca. 161, 318	873
Taylor *v.* Hare	New Rep. 260	933
Tegetmeyer *v.* Lumley	Note (*a*) to Hutchinson *v.* Sturgess, Willes, 264	979
Tempest *v.* Fitzgerald	3 B. & Ald. 680	728
Thompson *v.* Gillespy	5 E. & B. 209	568
——— *v.* Hopper	Ante, p. 172	205
——— *v.* Taylor	6 T. R. 478	319
——— *v.* Universal Salvage Company	3 Exch. 310	1018
Tithe Commissioners, In the Matter of	1 Dowl. P. C. N. S. 810	551
Tippets *v.* Heane	1 C. M. & R. 252	509
Toller *v.* Attwood	5 T. R. 299	637
Trafford *v.* Boehm	3 Atk. 440	223
Trappes *v.* Harter	2 Cr. & M. 153, 181	885
Travers *v.* Travers	2 Beav. 179	501
Tripp *v.* Armitage	4 M. & W. 687	359
Turney *v.* Dodwell	3 E. & B. 136	820

V.

Vallejo *v.* Wheeler	1 Cowp. 143, 153	243
Vaughan *v.* Menlove	3 New Ca. 468	477
Vherboom *v.* Chapman	13 M. & W. 230	323

W.

Walker *v.* Maitland	5 B. & Ald. 171	948
——— *v.* Rostron	9 M. & W. 411	567, 756
Warbrook *v.* Griffin	2 Brownl. & G. 254	894
Ward *v.* Burbury	18 Beav. C. C. 74	618
——— *v.* Byrne	4 H. L. Ca. 1	72
Waters *v.* Merchants' Louisville Insurance Company	11 Peters' Rep., U. S. 213, 219	948
Watson *v.* Pearson	2 Exch. 581	612
Weaver *v.* Floyd	21 L. J., N. S., Q. B. 151	589
Weeks *v.* Maillardet	14 East, 568	798
West *v.* Steward	14 M. & W. 47	800
Western *v.* Russell	3 Ves. & B. 187	873
Wetherell *v.* Weeghill	3 Y. & C. Exch. Eq. 243	550
Wharton *v.* Walker	4 Exch. 200	567
Whateley *v.* Crouter	5 E. & B. 709	465
White *v.* Bluett	22 L. J. Exch. 36	933
——— *v.* Garden	10 Com. B. 919	25
Whitcher *v.* Hall	5 B. & C. 269	909
Wilkie *v.* Geddes	3 Dow. 57	202

		PAGE
Williams *v.* East India Company	3 East, 192	477
——— *v.* Everett	14 East, 582	758
——— *v.* Pritchard	1 T. R. 2	251
Willis *v.* Hiscox	4 M. & Cr. 197	631
Wills *v.* Adey	2 Com. B. 246	367
Wilson *v.* Brett	11 M. & W. 110	897
Wilsons, In re	1 Sch. & Lef. 320, note (*a*)	849
Wise *v.* Charlton	4 A. & E. 786	336
Wood *v.* Bell	5 E. & B. 772	357
—— *v.* Copper Miners' Company	14 Com. B. 428	258
Woods *v.* Russell	5 B. & Ald. 942	358
Worms *v.* Storey	11 Exch. 427	790
Wright *v.* Skinner	1 M. & W. 144	983
Wrigley *v.* Sykes	21 Beav. 337	619
Wyld *v.* Pickford	8 M. & W. 443, 460	897
Wynch, Ex parte	5 De G. M. & G. 188	619
Wyrley Canal Company *v.* Broadley	7 East, 368	652

Y.

Yates *v.* Knight	2 New Ca. 277	217
—— *v.* Hoppe	9 Com. B. 541	756
Young *v.* Moeller	5 E. & B. 755	682

CASES

ARGUED AND DETERMINED

IN

Hilary Vacation,

XIX. VICTORIA. 1856.

The Court of Queen's Bench sat in Banc in this Vacation on the 23d of February, for the purpose of giving judgments only.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

RICHARD HENRY BILLITER *v.* HEATHFIELD YOUNG.

Feb. 9

Trover by the assignee of F., an insolvent debtor, for a conversion in the time of the insolvent. Pleas, amongst others, Not guilty, and a plea justifying the conversion as being a seizure under a fi. fa. issued before the insolvency on a judgment against F. in favour of the defendant. Replication: that F., within three months before his imprisonment, being in insolvent circumstances, with a view of petitioning the Court, fraudulently charged his estate in favour of defendant, being a creditor, by a warrant of attorney void within stat. 1 & 2 Vict. c. 110, s. 59, and that the judgment was on that warrant of attorney. Issue was taken on the replication. The verdict was found for the plaintiff on all the issues; and he had judgment. Error was brought on the record, and also on a bill of exceptions, which set forth the evidence. By this it appeared that the judgment was on a warrant of attorney, voluntarily given with a view of petitioning the Court, and that defendant had disposed of the goods seized before the insolvency. The Judge ruled that this was evidence of a conversion, to which ruling there was an exception.

Held, by Jervis, C. J., Alderson, B., Cresswell, J., and Martin, B., with whom Sir W. Maule, before his retirement from the bench, agreed, that the warrant of attorney was, under stat. 1 & 2 Vict. c. 110, s. 59, wholly void, and not merely voidable; that the assignee might sue; and that trover for a conversion of F.'s goods before the insolvency was a proper form of action; that therefore the judgment was right, and the ruling unexceptionable.

Held, by Williams, J., and Crowder, J., with whom Lord Wensleydale, before his retirement from the Bench, agreed, that the warrant of attorney was not absolutely void, but valid till the assignee elected to avoid it. That there was consequently no wrongful conversion before the insolvency; and that the plaintiff, if entitled to recover at all, could not recover in trover; and that there ought to be a venire de novo on the bill of exceptions on the ruling as to Not guilty, and judgment non obstante veredicto on the insufficiency of the replication to the special plea.

On the bill of exceptions, it appeared that the plaintiff had tendered in evidence an adjudication of the Insolvent Court, discharging F. after he had been in custody for one year, and had proved that immediately afterwards he was allowed to go free by the defendant, who was his only detaining creditor. The defendant's counsel offered to admit that such an order was made, but objected to its being read. The judge ruled that it might be read; to which the defendant excepted. It was read; and it stated the detainer for a year to be on the ground that the warrant of attorney was a fraudulent preference.

Held, by the whole Court, that the adjudication was admissible, not as evidence of the truth of the ground on which it purported to be made, but because that adjudication, followed by the immediate discharge of F., was evidence of defendant's complicity with F. And that the plaintiff was not bound to take the defendant's admission of its effect.

Judgment affirmed.

THIS was a proceeding on error suggested by the defendant. The
*2] case was argued in the Exchequer *Chamber, by *Willes* for the defendant, and *Bovill* for the plaintiff, before Jervis, C. J., Cresswell and Williams, Js., and Parke, Platt, and Martin, Bs., in Easter term 1854 (May 4). The argument was not completed on that day; and the cause was again argued by the same counsel in Michaelmas term 1854 (November 17), before Pollock, C. B., Maule, Williams, and Crowder, Js., and Platt, Parke, and Alderson, Bs.; when the Court took time to consider of the judgment.

A fresh argument was ordered; and the cause was again argued, by *Vernon Harcourt* for the defendant, and *Bovill* for the plaintiff, in Trinity term 1855 (May 26), before Jervis, C. J., Pollock, C. B., Maule, Cresswell, Williams, and Crowder, Js., and Parke, Alderson, Platt, and Martin, Bs. *Cur. adv. vult.*

The state of the record and the arguments sufficiently appear by the judgments, which were now delivered seriatim, there being a difference of opinion on the Bench.

*3] *CROWDER, J.—This case has been twice argued in the Exchequer Chamber. The first argument was before the Lord Chief Baron, Parke, B., Platt, B., Williams, J., Martin, B., and myself: and, the Court so constituted being equally divided in opinion, a second argument was desired, which was accordingly had before the Lord Chief Justice of the Common Pleas, the Lord Chief Baron, Parke, B., Alderson, B., Maule, J., Cresswell, J., Platt, B., Williams, J., Martin, B., and myself. After the fullest consideration, I am of opinion that the plaintiff in error is entitled to our judgment. I entirely concur in the view taken of this case by Lord Wensleydale, who has favoured me with the written judgment which he had prepared before he quitted the Bench: and, as I am desirous of adopting all his arguments and reasoning, I think, in order to give them their full effect, I ought to use his own words. I shall therefore take leave to deliver my opinion in the very language in which he has expressed himself.

This is a writ of error from the Queen's Bench. The declaration is by the plaintiff as assignee of Benjamin Flint, an insolvent, and contains two counts. The first is, in the usual form of an action of trover, against the defendant for converting to his own use, or *wrongfully de-*

priving Flint, the insolvent, of the use and possession of, certain goods described in the declaration. The second for converting to his own use, or wrongfully depriving the plaintiff, as assignee as aforesaid, of, certain goods of the plaintiff as assignee, of the like description.

There were several pleas. 1. Not guilty. 2. That the goods were not Flint's. 3. That they were not the goods of the plaintiff as assignee. 4. That the *defendant, before the insolvency, by the judgment of Her Majesty's Court of Queen's Bench, recovered against the said Benjamin Flint his debt of 460*l.*, and also 3*l.* 10*s.* for his damages; and, for having execution of the said judgment and recovering the said sums, the defendant caused to be sued out a writ of fi. fa. directed to the sheriff of Sussex, commanding him to levy of the goods and chattels of the said Benjamin Flint 460*l.* and 3*l.* 10*s.*, so recovered as aforesaid, with a direction to levy 235*l.* and 5*s.*, besides, &c. And that the defendant caused the said writ to be delivered to the said sheriff to be executed, and the said sheriff, in execution of the said writ, and under and by virtue of the same, and before the insolvency, seized and took the said goods in the said first count mentioned and sold the same, and levied thereout parcel of the moneys by the said writ and the said endorsement so directed to be levied; and the said seizure, sale, and levy were and are the said conversion or wrongful deprival, in the said first count mentioned. To this plea there was a replication that, after stat. 1 Vict. c. 110, and within three months before the commencement of the imprisonment of the said insolvent, being such imprisonment as is in such Act in that behalf mentioned, the said insolvent, being then in insolvent circumstances, did, with the view and intention by him of petitioning the Court for his discharge from custody under such Act, voluntarily, fraudulently, and contrary to such Act, charge his estate to and in favour of the defendant, he then being a creditor of such insolvent, to wit, by means of a certain warrant of attorney, fraudulent and void within the true intent and meaning of the last-mentioned statute: whereupon and whereby, and not otherwise, afterwards, *the defendant obtained the said judgment and execution as aforesaid, which were and are fraudulent and void. And on that replication the defendant took issue. The jury found, by direction of the learned Judge, my brother Coleridge, before whom the cause was tried, the 1st issue as to the 2d count for the defendant; the 2d issue for the plaintiff, the 3d for the defendant: and no question arises upon any of these findings. The question arises entirely on the plea of Not guilty to the 1st count, and on the issue as to the replication to the 4th plea. On the trial a bill of exceptions was tendered to the ruling of the learned Judge on these latter issues. The bill of exceptions sets out a great deal of evidence of the insolvent circumstances of Flint; of his conduct towards the defendant and the defendant's towards him; the warrant of attorney, and the judgment and execution thereon; the

[*4

[*5

vesting order of the 24th April, 1852, vesting the estate in the provisional assignee, and the appointment of the plaintiff as creditors' assignee on the 5th June, 1852. It then states that the counsel for the plaintiff tendered in evidence an adjudication made in the matter of the petition on the 18th May, 1852. Whereupon the defendant's counsel offered to admit that the adjudication was made on that day, but objected to the contents being read in evidence on behalf of the plaintiff. This objection was overruled; and the adjudication was read; which contained a judgment that the insolvent had, with a view of giving a preference, fraudulently charged or mortgaged part of his property, and an order that he should not be discharged until he had been in custody for one year from the date of the vesting order, at the suit of
*6] one or more of the creditors mentioned in the schedule. Evidence *was then given that he was taken into custody on the same 18th May, 1852, and, on the 20th, discharged by the defendant, who was his only detaining creditor. Several other facts were proved, showing the favourable disposition of the defendant towards the insolvent, and, vice versâ, of the insolvent to him.

The learned Judge, in leaving the case to the jury on the issue as to the 1st plea as to the 1st count and the issue on the replication to the 4th plea, told them that there was evidence for their consideration, on which they might find their verdict for the plaintiff on those issues. The defendant's counsel excepted to the ruling of the learned Judge as to the admission of the contents of the adjudication to be read, and to the direction that there was evidence to go to the jury on the said 1st and 4th issues. First, because there was no evidence to go to the jury of a wrongful conversion, nor any to sustain the issue on the replication to the 4th plea.

I think it clear that the learned Judge was right in admitting the evidence of the contents of the adjudication to show for what period he was to remain in custody; for the fact that, in two days afterwards, the defendant, the only detaining creditor, discharged him, though he was ordered to be kept in custody for a year, was a very material circumstance to show the footing they were upon with each other, and important towards proving that the warrant of attorney was given by way of fraudulent preference. It is true that the defendant's counsel offered to admit that part of the contents: but the plaintiff was not bound to take that admission; and it is to be presumed that the Judge would take care that the ground of adjudication, viz. the fact of the
*7] fraudulent charge or mortgage, was not to be taken as proof *of that fact. And I think it is equally clear there was abundant evidence in favour of the plaintiff on the question as to the warrant of attorney and judgment thereupon being a fraudulent and void assignment, transfer, charge, delivery, or making over, within the meaning of stat. 1 & 2 Vict. c. 110. If a warrant of attorney be given for the ex-

press *purpose* of being acted upon forthwith by a judgment and execution, and it is so acted upon, it may be an assignment, transfer, or making over of a lease so as to create a forfeiture; Doe dem. Mitchinson *v.* Carter, 8 T. R. 300;(*a*) and so, if given for the *express purpose* of the insolvent's goods being taken by a favoured creditor, it may be an assignment, transfer, charge, or delivery or making over to such creditor, as was decided in Sharpe *v.* Thomas, 6 Bing. 416 (E. C. L. R. vol. 19). It seems more properly to fall under the description of an assignment, or transfer, than a charge.

The only question remaining upon the bill of exceptions is, whether there was evidence of the *wrongful* conversion by the defendant to his own use, of Flint's goods, or the *wrongfully depriving him* of the use and possession of them so as to enable the plaintiff to maintain this action. The only evidence was the directing and assisting the sheriff in the sale of the goods under the execution, grounded on the fraudulent warrant of attorney and judgment (which was the voluntary act of the insolvent himself), the proceeds of which were paid over to him: and the question is, Whether that act is one which the assignees may treat as a wrongful conversion or deprival of the property. If not, there should be a venire de novo. A similar question, though not precisely the same, would arise on the record, if the *venire de novo was not awarded. The defendant would claim the judgment of the [*8
Court, on the confession by the replication of the truth of the plea and the insufficient answer in that replication. The only difference is, that, on the trial, there was evidence that the defendant was cognisant of, and assisted in, the voluntary preference by means of the warrant of attorney, and judgment, and execution, whereas on the record such preference may have been without the privity of the defendant. I am of opinion that the acting upon the judgment, given by way of voluntary preference, by seizing and selling under the execution, is not a conversion of the goods of the insolvent or a wrongful act against him, which the assignees can treat as wrongful against themselves, either if the defendant was not cognisant of the fraudulent preference or was cognisant of it. It is in truth no more than a consent to the assignment effected thereby.

The case turns upon the construction of stat. 1 & 2 Vict. c. 110, s. 59, which provides that, "if any such prisoner shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors," &c., "every such conveyance, assignment, transfer, charge, delivery, and making over shall be deemed and is hereby declared to be fraudulent and void as against the provisional or other assignee or assignees of such said

(*a*) See Croft *v.* Lumley, 5 E. & B. 648, 682 (E. C. L. R. vol. 85).

prisoner appointed under this Act: Provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over shall be so deemed fraudulent and void unless made within three *months before the commencement of such imprisonment, or with the view or intention, by the party so transferring, charging, assigning, conveying, delivering, or making over, of petitioning the said court for his discharge from custody under this Act."

*9]

The first question which arises is, What is the meaning of the terms *fraudulent* and *void* as against the assignees? Do they mean to render the transaction fraudulent by the insolvent debtor, and absolutely *void* as against the assignees, or only to put such transactions, which are really nothing but fraudulent preferences, on the footing of similar preferences under the bankrupt laws, before they were made acts of bankruptcy, and to render them void at the election of the assignees? I am of opinion that the latter is the meaning of the statute, and that the true construction is, that they are placed on the footing of fraudulent preferences, before they were made acts of bankruptcy by stat. 6 G. 4, c. 16: the transaction, though fraudulent in the bankrupt against the assignees, is only void at their election; and, before it is actually avoided, some act must be done to indicate the intention to do so. When they were made acts of bankruptcy, the title of the assignees had relation back to the act of fraudulent preference, and defeated it, so that, from that moment, any disposition of the goods by another was an illegal interference with the property of the assignee, and a conversion. But, before that statute, such preferences, when they were merely fraudulent against the assignees, were only voidable by them, not absolutely void, *and the property vested till avoided:* and they must now be so treated when they are not acts of bankruptcy, as was decided *by the case of Stevenson *v.* Newnham (in error), 13 C. B. 285 (E. C. L. R. vol. 76),(*a*) after a full consideration of the subject. Prior to an action of trover for goods delivered by way of fraudulent preference, a demand and refusal would be necessary in order to avoid the transaction; Nixon *v.* Jenkins, 2 H. Bl. 135, per Curiam, and Jones *v.* Fort, 9 B. & C. 764 (E. C. L. R. vol. 17). In the case of insolvency there is no relation; the title of the assignee never goes further back than the date of the vesting order; the act of preference by an insolvent of a particular creditor under the circumstances stated in this section of the Act, if it be put on the footing of a fraudulent preference under the Bankrupt Act, is simply an act by the insolvent fraudulent and void against his assignee, if he chooses to avoid it, and valid until he does. Cases were put by Mr. *Willes*, during the argument, where it might be for the advantage of the estate not to avoid the act; for instance in the possible, though not very probable, case when a chattel should be voluntarily delivered

*10]

(a) See Nicholson v. Gooch, 5 E. & B. 999 (E. C. L. R. vol. 85).

by the insolvent being then in insolvent circumstances, of small value, in satisfaction of a larger debt of a particular creditor, within three months before the commencement of imprisonment, and during the three months the estate might improve and a larger dividend be payable on all the debts than the value of the chattel would be equal to. In such a case the assignee would not elect to avoid it. According to what I think to be the true meaning of this section, then, the assignees can only treat the act as a fraud against themselves by the insolvent, and avoid it by claiming the goods acquired by that act, in this case, *by demanding the goods if they had remained in the hands of the creditor, or, if sold, by claiming the money; bringing in one [*11 case an action of trover, if the goods were refused to be delivered up, treating the refusal as an act of conversion, or bringing an action for money had and received in the other. But I think the plaintiff cannot possibly be allowed to treat the act of sale under the execution, authorized and consented to by the insolvent himself, as *itself being* a wrong *against* the insolvent, *and a wrongful depriving of the insolvent* of his goods, or a wrong to the assignees. The act of seizure was perfectly lawful and valid against the insolvent; it was only a part of the assignment of the goods agreed to by both; it was valid against all the world except the assignees when they should be appointed. They may then disapprove it, and, after so doing, have their remedy if the goods are in the defendant's hand; and, if they have been sold, they may have an action for money had and received; but they cannot treat the seizure and sale as a *wrong* against the insolvent, or as a wrong to themselves at the time it was made. I am therefore of opinion that, if the case stood on the record alone, the judgment should be reversed, and judgment given for the defendant below. And I think that upon the issue there was no evidence of a conversion, though the defendant may have been cognisant that the judgment and execution were a fraudulent preference; and therefore there should be a venire de novo.

But, if it be conceded, as argued on behalf of the defendant in error, that the words of the statute "fraudulent and void" are not to be construed *as simply void* at the election of the assignees, as other fraudulent preferences *are, but *absolutely void* without any qualification, I think [*12 it clear that such construction will not decide the case in favour of the defendant in error. If, in the enumerated cases in the 59th section, conveyances, assignments, transfers, and deliveries to creditors of estate real and personal, and payments of debts to creditors by *money or bills*, are all *absolutely void*, what is the consequence? Why, simply. that the act of the insolvent does not *operate at all*, real and personal estate remaining exactly as they were for the benefit of the assignees; their title to that real estate and chattel will not be affected in the least; *when* their title arises by the vesting order, and not *till then*, they have a right to all the real and personal estate wherever they can find it;

and, when they do, they may take all that has been fraudulently conveyed, transferred, or assigned, unaffected by the previous conveyance, transfer, or assignment by the insolvent to a creditor. Such conveyance, transfer, or assignment will have conveyed nothing to the creditor. The fraudulent and void act of the insolvent will not *give* the assignees any *title* at the date of *the* act. The time of the vesting of the title remains as before. If, instead of considering the case of a transfer of goods, we take the case of a voluntary conveyance of land to a creditor, no title is given at the date of the conveyance to the assignee by relation; the whole effect of the Act is that, when the vesting order is made which transfers the land to the assignees, they may enter and take possession, just as if no such fraudulent and void conveyance had been made. If the land is diminished in value, for instance a house burnt down; or if, in the case of an assignment or delivery of goods, they are lost or destroyed; if there is a transfer of perishable *commodities; if, for instance, cattle are delivered and die, or are killed and eaten; the assignees have no remedy any more than they would have if no fraudulent conveyance at all had been made. If the chattels had continued to exist till the date of the vesting order, the assignees would have had them. The previous transfer and delivery to another, which was merely void by the statute, would not have stood in their way; but, if they exist no more, the assignees can get nothing.

*13]

On the supposition that the statute means to avoid absolutely all assignments, transfers, and deliveries of estate, goods, or money, and not merely make them voidable as fraudulent, there is no ground to say that it also makes the mere *receipt* of the thing transferred a *wrong* against the assignees to be afterwards appointed. Can any one reasonably contend that, if a creditor receive a bank note by way of payment of his debt innocently (for the clause extends to all transfers with or without knowledge of insolvency), he is thereby guilty of a wrong act, a conversion of the bank note by the receipt of it? If he receive goods in satisfaction, is he, by the act of receipt simply, or, to go further, suppose he afterwards pay the note, or sell the goods to another bonâ fide for value, is he a tortfeasor against the assignees who become entitled, it may be a year after? I think it impossible so to contend. The act of preference is *avoided* only against assignees, not made an *unlawful* act which they may treat as such and recover for. If this be true as to money paid, or goods transferred or delivered by way of preference, it is equally true as to goods assigned by the circuitous process of giving a warrant of attorney for the purpose of judgment being entered thereon, and the goods taken thereby: it is but a mode of assignment, *as I have already shown; and that assignment is simply avoided; but the acting under it in taking the goods is analogous to the receipt of goods delivered. Though a void act, it is not a tortious act, and cannot be so treated by the assignees. I am of opinion, therefore,

*14]

even if the statute is to be construed to do more than put the case of a voluntary transfer on the footing of a fraudulent preference under the old bankrupt law, that it would give no title to the assignees to recover in this case.

But some consequences which will follow the adoption of the construction that the transfer is absolutely avoided are very serious. The 59th section applies to all transfers of real property or goods, and to all payments of debts to creditors, made within three months before the imprisonment, or months, or even by possibility longer time before, if made with a view to petition the Insolvent Court. If all these transfers and payments are absolutely void, and those words are to be construed strictly, no title can be conveyed to the land or goods, or bank note (unless payable to bearer), to a bonâ fide purchaser for value from the creditor; and the assignees after the vesting order might recover the estate, goods, or note from him or any subsequent purchaser. If, on the other hand, the transfer or payment is merely fraudulent, then it is clearly settled that the interest conveyed passes, defeasible by the assignee: but, when a bonâ fide purchaser has acquired a title, it is then too late, I conceive, for the assignees to interfere, as it is certainly for a party defrauded in a contract with him to do so. Can there be any doubt which is the more reasonable construction, when these consequences are considered? And the case of Brook *v.* Mitchell, 6 New Ca. 349 (E. C. L. R. vol. 37), decided *by Tindal, C. J., my late brother Bosanquet, and my brothers Erskine and Maule, is an [*15 authority completely in favour of the defendant, and decided rightly, I think, on plain principles of justice. It was an action of trover brought by the assignees of a bankrupt, on the possession of the bankrupt, for goods which were seized under an execution and warrant of attorney, not filed within twenty-one days under stat. 3 Geo. 4, c. 39, such warrant of attorney being by the 2d section deemed fraudulent and void against assignees; and, by the same section, the assignees are entitled to recover back and receive, for the use of the creditors at large, all the moneys levied, or effects seized, by virtue of such judgment or execution. The Court decided, and I think most properly decided, that, as the possession was laid in the bankrupt, and the conversion before the bankruptcy, and as the warrant of attorney and judgment were made void only as against the assignees under the subsequent commission, not as against the bankrupt himself, the judgment and execution were good against him, and the levy was no wrongful conversion, and the transaction good and valid against him up to the time of the bankruptcy. The Court said, upon no legal construction could the allegation be supported, that there was any wrongful conversion before the bankruptcy. It also said that the assignees could not maintain an action of trover, because they never had the possession, or right of possession, in themselves, because the relation was not carried further back than the act

of bankruptcy, and there was no provision to carry it back to the giving the warrant of attorney. So there is none in this case to create any relation at all: the title of the assignees begins with the vesting order. This seems to me to be perfectly correct; *nor does the provision in stat. 3 Geo. 4, c. 39, which does not occur in this section of stat. 1 & 2 Vict. c. 110, that the assignee may recover back the moneys levied or effects seized, though urged as an additional argument in the judgment in that case, by any means affect the validity of the previous reasoning, which I think most satisfactory. This provides that the assignee may recover back the moneys levied or effects seized; the former, I presume, if the moneys have been levied, the latter if they have been only seized; merely points out the consequence of a *void* warrant and judgment and execution thereon, as to the creditor who did not file the warrant of attorney, and was therefore himself the cause of its being fraudulent and void. The case of Jackson *v.* Thompson, 2 Q. B. 887 (E. C. L. R. vol. 42), is cited as an authority that an action of trover may be maintained where there was a voluntary conveyance made void against the assignees, under the same section of stat. 1 & 2 Vict. c. 110 (sect. 59), and where the defendant converted the goods under that conveyance. The question decided by the Court in that case arose on a motion for a new trial on the ground that one of the issues raised by the record was not proved, because a conveyance, which

*16]

it was, for the benefit of all the creditors was not a voluntary conveyance under that statute; and the Court held that it was. It was an action of trover, by the assignee of an insolvent, one count laying the possession in the insolvent, the other, in the assignees. To this count,(*a*) probably laying the conversion in the time of the insolvent, there was a plea of leave and license by the insolvent; replication, that before that leave and license the insolvent made a *conveyance void under stat. 1 & 2 Vict. c. 110, s. 59, and delivered the goods to the defendant; and that the leave and license to convert the goods was only for the purpose of giving effect to the fraudulent indenture: upon which the rejoinder took issue. The only question therefore was, whether the replication was proved; and that depended upon the question, whether the voluntary conveyance of all his effects for the benefit of all creditors was void. The question whether the action of trover was maintainable arose on the record; and there does not appear to have been any motion in arrest of judgment. Cases of fraud were cited in the argument, where the fraudulent transaction was held void, and not merely voidable. In the case of fraudulent preferences, the assignee may disaffirm, or not, as he pleases; they are voidable: so also, where one is induced by another to enter into a contract by fraud, the party deceived has a right to avoid it; the contract in the mean time is valid: but in the cases of frauds against creditors, by debtors convey-

*17]

(*a*) The first.

ing to others without valuable consideration, they are absolutely void, by the statute of Elizabeth, against the executions of those creditors without any further stop. Doe dem. Grimsby *v.* Ball, 11 M. & W. 531,† is within that principle.

I am of opinion that the judgment must be reversed and a venire de novo awarded, unless the parties will agree to strike out the plea of Not Guilty to the first count; and then the judgment should be reversed and given for the defendant, on the special pleading, non obstante veredicto.

*MARTIN, B.—This is a writ of error upon a judgment of the Court of Queen's Bench. The alleged error is contained in a bill of exceptions to the direction of my brother Coleridge upon the trial of the cause at the Lewes Spring Assizes, 1853. The action was founded upon stat. 1 & 2 Vict. c. 110, s. 59. The section enacts that, if any prisoner shall, before or after his imprisonment, being in insolvent circumstances, voluntarily assign *or charge* any property real or personal to any creditor, every such assignment or charge shall be deemed and is thereby declared to be fraudulent and void as against the assignee. A proviso follows, which is not material to the present case. The facts proved at the trial were substantially these. On the 28th February, 1852, Flint, being in insolvent circumstances, executed a warrant of attorney to the defendant, a creditor, authorizing judgment to be entered up for 460*l.* Judgment was signed on the 10th March, and a fieri facias issued; on the 23d March a levy was made, and goods seized and sold, and 148*l.* and upwards realized. On the 16th April a return was made to this writ; and on the 17th a ca. sa. was issued to levy the balance. On the 19th Flint was arrested and sent to prison. On the 23d he petitioned the Insolvent Court. On the 24th the vesting order was made, and the plaintiff appointed assignee. Various other facts were proved which it is unnecessary to mention, as there was clearly evidence to go to the jury that the insolvent voluntarily executed the warrant of attorney with the intention of giving the defendant a preference: but it was not proved that the defendant took any other part in the transaction beyond acting upon the warrant of attorney, and directing the *officer to sell under the fi. fa. and give credit to the son of the insolvent at the sale to the extent of 100*l.* It was also not proved that any demand of the money was made upon the defendant, nor indeed that the balance beyond the 100*l.* was paid to him. [*18 [*19

There are two questions in the case: first, a substantial one, Whether the defendant is liable to an action at the suit of the plaintiff upon the above facts? Secondly, a formal one, whether the plaintiff can recover upon the present pleadings?

In my opinion the defendant is liable to an action. The object of the statute was to prevent a person, likely to become an insolvent debtor, and who afterwards became such, from favouring one creditor

in preference to the others, and to secure to the assignee upon his appointment the present possession of the insolvent's property, for the purpose of equal distribution amongst all the creditors. The giving the warrant of attorney was, I think, clearly a charging within the meaning of the statute; and the damage to the estate was the levy and sale, under the fi. fa., of the insolvent's goods. Now this was done by the sheriff's officer by the procurement of the defendant, and for his immediate benefit; and, in consequence of this, the plaintiff, the assignee, was deprived of what the law intended he should have, viz., the present possession of the insolvent's property; and this by means of a transaction of which the defendant was the moving party, and which the law declares to be fraudulent and void. The act of seizure was a fraudulent and void act against the plaintiff, as assignee, and injurious to him by depriving him of property which he otherwise would have had. In my opinion this affords to him a right of action *20] *against the defendant, being the person procuring the seizure to be effected, and alone deriving benefit from it. There is both injury and damage to the plaintiff as assignee; and when these concur the law gives a right of action. There were very many difficulties suggested from consequences alleged as likely to arise, in the event of the goods seized coming to the hands of innocent third parties, and also various others of various kinds. When they arise they must be dealt with according to law; but the present question is one directly and immediately affecting the person procuring and deriving advantage from the act declared by the law to be illegal. The case of Brook *v.* Mitchell, 6 New Ca. 349 (E. C. L. R. vol. 37), was cited and much relied on on behalf of the plaintiff in error. In reality it bears upon the second point only. So also a case of Bennett *v.* Daniel, 10 B. & C. 500 (E. C. L. R. vol. 21), was cited; but it does not affect the matter in controversy. My judgment is founded upon what appears to me to be the plain, obvious, and perfectly intelligible language of the section of the Act of Parliament. To my apprehension it is clear both in language and object.

The second question is, Can the plaintiff recover upon the present pleadings? There is no doubt much difficulty in this point; but it is one merely of form, not of substance or merits: and, notwithstanding the case of Brook *v.* Mitchell, I think the difficulty may be got over by reading the declaration as averring *that the defendant, before Flint became an insolvent, converted to his own use, and wrongfully deprived Flint of the use and possession of, the goods seized, and that the plaintiff, as assignee, was damaged by reason thereof.* Reading it in this *21] way, I think the cause of action may *be deemed sufficiently stated. The seizure and sale of the goods caused by the procurement of the defendant deprived Flint of the possession of them: and, by reason of subsequent events, this became a fraudulent and void act as against

the plaintiff, the assignee. This was injurious to him as such, and may be considered as alleged in the declaration, as the cause of action, which may be deemed to be a special count upon the 59th section. For these reasons I think the judgment ought to be affirmed. There was another point raised as to the admissibility of certain evidence. I think this was satisfactorily disposed of in the course of the argument.

WILLIAMS, J.—I am of opinion that in this case there ought to be a venire de novo; for that the Judge at the trial was wrong in telling the jury that there was evidence, for their consideration, on which they might find their verdict for the plaintiff on the issue as to the plea of Not Guilty to the 1st count of the declaration. That count avers that, before the insolvency of Flint, the defendant wrongfully converted to his own use, or wrongfully deprived the insolvent of the use and possession of, certain of his goods. In order to sustain this averment, it was necessary, in my opinion, to show some dealing with the goods of the insolvent which was a wrongful act against him. And the question is, Whether a sale, instigated by the defendant, under an execution issued by him against the insolvent, on a warrant of attorney given by him by way of fraudulent preference, is such an act. The transaction cannot even be described without showing that, in point of fact, it originated and was authorized by the insolvent, and could not therefore *be wrongful against him: but it is argued for the plaintiff that, [*22 in point of law, that authority may, as against the assignees of the insolvent, be regarded as if it had never existed, because it consisted of a warrant of attorney, which by stat. 1 & 2 Vict. c. 110, s. 59, is to be deemed fraudulent and void as against them. This argument fails, unless the assignees have a right to treat the warrant of attorney as absolutely void and null against them. But, unless there is a distinction in this respect between bankruptcy and insolvency (for which no good reason has been, nor in my opinion can be, suggested), the case of Stevenson *v.* Newnham, 13 C. B. 285 (E. C. L. R. vol. 76), shows conclusively that they have no such right. According to that decision, the transaction is only voidable at the option of the assignees, and their election so to treat it has no relation back so as to avoid it ab initio. And the judgment of the Exchequer Chamber in this case fully sustains, as it seems to me, that passage of the judgment of Tindal, C. J., in Brook *v.* Mitchell, 6 New Ca. 352 (E. C. L. R. vol. 37), which, if it be good law, will plainly govern the present case, viz., "as against the bankrupt himself, therefore, the judgment was good, and the execution a valid execution, and the levy was no wrongful conversion; and so the transaction would remain a good and valid execution against him at all events up to the time of the bankruptcy. Upon no legal construction, therefore, as it appears to us, can the allegation be supported that there was any wrongful conversion before the bankruptcy." For these reasons I am of opinion that there ought to be a venire de novo.

*23] It has been said that, in the view which I have taken of *this case, it turns upon a technical difficulty, and is a mere discussion as to the proper form of action. I cannot accede to this suggestion; though, even if it were true, it would plainly be our duty to decide the point according to law, however irksome such a duty might be. If the action of trover be sustainable, the execution-creditor will be rendered liable for the absolute value of the goods at the time of the sale under the execution without regard to the sum which they actually produced; which might lead to great injustice, especially in cases where the creditor was ignorant of the approaching insolvency of the debtor who preferred him. Trover is a proper remedy where the execution-creditor himself became the purchaser under the execution, and, the goods still remaining in his hands, he refuses to give them up to the assignees on demand; see Nixon *v.* Jenkins, 2 H. Bl. 135: but a case might occur where the circumstances are such that a demand and refusal would be no evidence of a conversion of the goods, because the creditor has ceased to have it in his power to restore them, and no action for money had and received would lie because no money has passed into his hands. In such a case it has been contended that no action at all is sustainable against him by the assignees. Without going that length, I am of opinion that, assuming there is some remedy for them, the proper one is an action on the case on the statute, stating specially all the facts, in which action the damages would be proportioned to the circumstances, and would not necessarily (as in trover) be the absolute value of the goods seized under the execution.

*24] *Cresswell, J.—I am of opinion that the judgment of the court below should be affirmed. The main question to be decided in this case, and the only one upon which I think it necessary to state my opinion at length, depends upon the effect to be given to the 59th section of stat. 1 & 2 Vict. c. 110, by which it was enacted "that if any such prisoner shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors," &c., "every such conveyance, assignment, transfer, charge, delivery, and making over *shall be* deemed and is hereby *declared to be* fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed under this Act." The first question arising on this section is, What is the meaning of the words "is hereby declared to be fraudulent and void as against the assignee or assignees of such prisoner"? Does it mean that the act prohibited shall be wholly inoperative as against the assignee, and be treated as if it had never been done, or that the assignee may at his election render it void by some act to be done by him? If the Legislature had intended that such act should be altogether inoperative, I

know not what stronger or plainer language could have been used to indicate that intention: but, if it was intended that the assignee might elect to declare it void and render it so by some act of his, words much more apt to express that meaning might have been adopted: and, as I cannot discover that the enactment, if construed according to the plain meaning of the words used, would lead to any absurdity or injustice, it seems to me that we ought so *to construe it, and to hold that the [*25
acts mentioned in the section in question are, as against the assignee, to be deemed, as the Legislature has thereby declared them to be, fraudulent and void. In Doe dem. Grimsby *v.* Ball, 11 M. & W. 531,† the Court of Exchequer appears to have been of opinion that the assignee of an insolvent, sued in ejectment for lands conveyed by the insolvent to a party under whom the lessor of the plaintiff claimed, might make a good defence by showing that the conveyance was fraudulent and void against creditors within stat. 13 Eliz. c. 5, although it did not appear that they had adopted any proceedings to get the conveyance cancelled or set aside. It may be said that this construction is inconsistent with the supposition that the party to whom such transfer is made can give a good title to a purchaser from him, whereas the case of White *v.* Garden, 10 Com. B. 919 (E. C. L. R. vol. 70), shows that a bonâ fide purchaser would have a good title; and that to hold the contrary would be both absurd and unjust. It appears to me that no such point is established by the case of White *v.* Garden. That decision proceeded on the ground that the first sale was not, under the circumstances there proved, to be *treated as void*, and that therefore the vendee might give a good title to a bonâ fide purchaser. The Court did not say that the second vendee had a good title, and therefore the first sale was not void, but that the first sale was not void, and therefore the second vendee had a good title. To assume that White *v.* Garden is an authority in this case is to assume the very question under consideration. The numerous cases respecting void and voidable leases do not, as it seems to me, *militate against the construction which I have [*26
put upon this enactment. In many of them, a provision that for breach of any covenant by the lessee the lease should be altogether void has been held to be explained by the superadded words, "that the lessor might re-enter;" and in others, where the latter words were omitted, it was held that, although the words imported that the lease should be void, yet it must have been *intended* that the breach of covenant by the lessee should only render the lease voidable at the election of the lessor; for that, to hold it absolutely void, would enable the lessee to take advantage of his own wrong. A somewhat similar principle appears to have prevailed in the decisions as to ecclesiastical leases made contrary to stat. 13 Eliz. c. 10. If made by a corporation aggregate with a head, they have been held to be good during the life of the head, and voidable afterwards, because the statutes were made for the

protection of successors; but, if made by a corporation aggregate without a head, they are absolutely void ab initio, for they must be altogether good or altogether bad: the words there are construed in their ordinary sense, not being controlled by any *adverse intention*.

Assuming then the acts mentioned in this section to be void, the next question is, From what time are they to be treated as void? From the time when they are done, from the time when the assignees are appointed, or from the time when they elect to treat them as void? I apprehend that they must be held to be void from the time when they were done, or they will not be void as against the assignees. If real or personal estate or securities for money are delivered, under circumstances bringing the transaction within this section, and the property
*27] so delivered remains in the hands of the party so *receiving it, the transaction may in some sense be considered as continuing, and so become void at a future time. But the payment of money, once made, is at an end; the transaction is complete; and, if good, then the effect of it cannot be avoided at any subsequent time; and the remedy, manifestly intended to be given to the creditors at large through the assignee, would be merely illusory unless the transaction is held to be void ab initio. Take the case now under consideration. Goods are delivered by way of fraudulent preference by a party intending to petition the Insolvent Court; the party receiving sells them before the insolvent goes to prison or petitions. If the transaction is valid, the receiver acquires the property and may make a valid sale. The insolvent then goes to prison, petitions, and an assignee is appointed. What remedy has he on behalf of the creditors? If he brings an action for money had and received, upon what principle can it be maintained? The goods are supposed to have been lawfully transferred; it is assumed that, when he sold, they were the property of the transferree, and the money which he received was the proceeds of the sale of his own goods; it cannot then be said that he received it to the use of the assignee. If such an action is to be maintained it must be on the assumption that the property remained in the insolvent, that the party received the proceeds of the sale of the insolvent's goods, and that, consequently, the assignee may sue for it. If the assignee makes a demand of the goods, and, if they are not delivered, treats the non-delivery as a refusal, and brings trover, relying on such refusal as a conversion, a conversion it is not, but under some circumstances good evidence of a conversion. But
*28] assume that the favoured creditor, in *answer to a demand by the assignee, says, "I consumed or sold the goods long before the imprisonment or petition." If the transaction is valid until that time, there is no evidence of wrongful conversion, but a mere exercise of lawful dominion over his own property; or is the assignee to have, as has been suggested, a special action on the case? I have not been able to discover any form in which a plausible complaint could be made

against the party, supposing that the act of the insolvent is to be treated as void only from the time of the imprisonment or petition. Inasmuch then, as the Legislature has in plain terms declared that the several acts enumerated in the 59th section of stat. 1 & 2 Vict. c. 110, are fraudulent and void as against the assignee, and as they cannot be void against him unless he can treat them as inoperative ab initio, I think we are bound to hold that they are void ab initio, which gives the statute an operation in favour of the assignee by relation to the time when such acts are done; not by vesting the property in the assignee by relation to that time, but by preventing any person from saying, in answer to the assignee, that he derived title from the insolvent by any of the acts falling within the 59th section.

Assuming this view of the subject to be correct, it remains to be ascertained, whether the action now under consideration can be maintained, in which the plaintiff complains of a conversion of the insolvent's goods before he became insolvent. It appears that the defendant was active in procuring the seizure and sale of the goods, so that he unquestionably exercised the dominion of an owner: but it has been contended that, at all events, there should have been a demand and refusal. I think it was unnecessary. Having already expressed my opinion that *the delivery was void, and not voidable at the election of the assignee, a demand was necessary for the purpose of showing [*29 such election. If the goods had remained in the possession of the defendant, and the circumstances of the case left it doubtful whether he claimed property in them or not, a demand and refusal might have been necessary to prove a conversion: but, admitting that mere possession given by the insolvent would have been lawful, as soon as it was shown that the transaction, as against the assignee, was fraudulent and void, he had a right to say that the property remained in the insolvent, whence it follows that the defendant having possession of the insolvent's goods sold and converted them to his own use, without any right to do so; it was therefore a wrongful conversion of which the assignee may complain in this action without any previous demand and refusal. The defendant is, in effect, estopped by the statute from saying that he derived title from the insolvent or that the goods so converted were not the insolvent's. If an action for money had and received, or a special action on the case, had been brought, as given by the next section in cases of warrants of attorney void for want of filing, what previous step would have been necessary to render void that which is said to be voidable only? If none would have been necessary, neither can I think demand and refusal necessary to the maintenance of an action of trover. It has been argued that the Court will not treat a party as a wrongdoer by relation. I think that is rather an objection of form than substance; the action really being to recover the value of the property converted,

*30] and not for damages other than that value. *And in Balme *v.* Hutton, 9 Bing. 486 (E. C. L. R. vol. 23), Mr. Justice Taunton points out the difference between holding a party liable to trover by relation, and making him a trespasser by relation: and I see no more hardship in holding this defendant liable to an action in trover than has been caused by statutes with relation to bankrupts, for a very long period. It has been remarked that, with reference to the Bankrupt Acts, the retrospective operation of them has in many instances been limited to a short period, whereas here the 59th section says that acts shall be void if done with the view or intention of petitioning the Insolvent Court, which would apply at any distance of time. But I am not aware that those in whose favour a fraudulent preference had been made were protected at any distance of time, even before such fraudulent preference was itself made an act of bankruptcy; and it is not likely that in practice the relation would go back to any distant period, from the difficulty of proving that it was then done with the view or intention of petitioning the Insolvent Court.

Having thus far dealt with this part of the case without reference to authority, I proceed to notice a few decisions which appear to me to have a material bearing both on the right to bring trover and the necessity for a previous demand and refusal. The case of Martin *v.* Pewtress, 4 Burr. 2477, appears to me to be a strong authority on both points. There the bankrupt, before his bankruptcy, being largely indebted to the defendants, his bankers, bought goods to a large amount on credit, which he sold at prime cost to the defendants, and

*31] *paid the price which he received into the defendants' bank, defendants being privy to the whole transaction; the goods were then sold for the use of defendants. The assignees brought trover for the goods *of the bankrupt*, and recovered a verdict, the jury thinking that this was no sale but a void transaction. A new trial having been moved for, Lord Mansfield reported the evidence; and it does not appear that there was any demand and refusal. It was argued for the defendants that trover would not lie, that the transaction was good against the bankrupts, and therefore the assignees could not maintain trover as standing in his place; but the Court held that they could, for that the fraud made this transaction *void*, and *it did not alter the property*. In the case before the Court, if the transaction was void it did not alter the property, and the defendant sold and converted to his own use the property of the insolvent. There is a case, Nixon *v.* Jenkins, 2 H. Bl. 135, which is supposed to be an authority for saying that a demand and refusal was necessary. It is difficult to understand from the report what were the facts of the case. All that the report says of them is: "Whitesett, in contemplation of insolvency, and with a view to defeat the claims of his creditors, sold a large quantity of goods to the defendant Jenkins." It is not stated whether Jenkins was a creditor, and

by the transaction was preferred, or that he was a party to the bankrupt's intention to defraud his creditors. The Court held that a demand and refusal was necessary; for that, "when the sale was made, the parties were competent to contract; there was no unlawful taking of *the goods, though the transaction was liable to be impeached by the assignees." Now, if both parties were aware of the fraudulent design, and acted in furtherance of it, although competent to contract, and although in point of form they did in fact contract, according to the case of Martin *v.* Pewtress the pretended sale was void and would not change the property. If the defendant was, not a creditor preferred by the transaction, but a bonâ fide purchaser, whatever fraud the bankrupt may have intended to perpetrate, the transaction would not be impeachable by the assignees. Moreover, it does not appear that the defendant Jenkins had sold the goods, or exercised any other dominion than that of merely receiving possession of them. I cannot therefore consider it as an authority for saying that a demand and refusal was necessary in this case; the defendant, here, having caused the goods to be sold. That case also was treated as one where the assignees might either affirm or disaffirm the contract, which was therefore voidable not void, and is no authority for requiring a demand and refusal where the original transaction is void. But it is said that at all events this transaction is no more than a voluntary preference of a creditor by a person in contemplation of bankruptcy, and that the delivery of goods for that purpose (unless it be an act of bankruptcy) is a transaction voidable only at the option of the assignees, and that consequently they cannot maintain trover without a demand and refusal, according to the case of Newnham *v.* Stevenson, 10 Com. B. 713 (E. C. L. R. vol. 70).(*a*) In that case it was said, in the judgment of the Court of Common Pleas and Exchequer Chamber (although not strictly *the point decided), that, if goods are delivered by way of fraudulent preference, the property vests in the transferree, subject to be divested by the assignees at their election, so that they must make a demand before they can sue, and then their title will not operate by relation, but only from the demand made. I have been unable to discover the authority upon which that statement of the law is founded. It appears to be rather at variance with the decision in Rust *v.* Cooper, 2 Cowp. 629, which treated such a transaction as void: but, assuming it to be correct, it does not in my judgment follow that a rule laid down by the courts as to a matter, not in terms prohibited by the bankruptcy laws, but which was deemed to be contrary to the spirit and policy of those laws, can be considered to govern the construction to be put upon the express words of an Act of Parliament. There is, however, a decision of the Court of Common Pleas, Brook *v.* Mitchell, 6 New Ca. 349 (E. C. L. R. vol. 37), which is supposed to be a direct authority for saying that

[*32

[*33

(*a*) And Stevenson *v.* Newnham, 13 C. B. 285 (E. C. L. R. vol. 76).

in such a case as the present trover cannot be maintained: and, if that is to be followed in this case, it is unnecessary to inquire about a demand and refusal. The declaration was upon the possession of the bankrupt, and a conversion by the defendant before the bankruptcy. It appeared, by the pleadings, that the bankrupt had given the defendant a warrant of attorney, which was not filed within twenty-one days after its execution, and upon which judgment was not signed, nor execution issued, until after that time; but execution was issued and executed before the bankruptcy. The case was argued on demurrer; and
*34] the Court, after taking *time to consider the question, held That, as against the bankrupt himself, "the judgment was good, and the execution a valid execution, and the levy no wrongful conversion; and so the transaction would remain a good and valid execution against him at all events up to the time of the bankruptcy. Upon no legal construction, therefore, as it appears to us, can the allegation be supported that there was any wrongful conversion before the bankruptcy." That is undoubtedly a direct authority as to the construction to be put upon stat. 3 G. 4, c. 39, s. 2, as to the effect of neglecting to file warrants of attorney: and, in order to give judgment for the plaintiff in the present case, it is necessary to distinguish it from Brook *v.* Mitchell, or to overrule that decision. It is to be observed that the 2d section of stat. 3 G. 4, c. 39, as to warrants of attorney is introduced into stat. 1 & 2 Vict. c. 110, immediately after the section on which the present question depends; and the particular remedy to be had by the assignee is pointed out, which Tindal, C. J., seems to think was done in order to provide for the want of property in the assignees; but the form of action to be brought by the assignees is not mentioned; the provision(*a*) is that such "assignees shall be entitled to recover back and receive, for the use of the creditors of such bankrupt at large, all and every the moneys levied or effects seized." But for the decision of the Court of Common Pleas, I should have thought those words might have been held to give an action of trover, that being the usual form of action used for the recovery of effects: moreover, the provision
*35] rendering void warrants of *attorney, on account of the neglect to file them or enter up judgment within a certain period, does not at all assume that they originate in any fraud on either side, or that there is at any time any actual fraud, but that they may operate unjustly against other creditors, and therefore shall not be available against them. There is, therefore, no reasonable ground upon which they could be held void ab initio for want of the subsequent act of filing. If, under such circumstances, a warrant of attorney followed by execution could be considered as a fraudulent transfer, it would be within the 59th section, and the introduction of the 60th would have been unnecessary. We must assume, therefore, that the 60th section relates to

(*a*) Of stat. 3 G. 4, c. 39, s. 2.

transactions other than those provided for by the 59th, which applies to transactions having their origin in fraud: and the Legislature may well have intended that they should be altogether inoperative if followed by imprisonment, or done with the intention to petition, although a less extensive remedy is given, by the 60th section, in the case of warrants of attorney and cognovits. I think, therefore, that the judgment in Brook *v.* Mitchell is not decisive of the present case: and, if it were, inasmuch as it stands alone, and depends upon the construction put upon stat. 3 G. 4, c. 39, not upon any rule of law or previously decided case, I should, sitting in a Court of error, feel bound to overrule it rather than give a judgment contrary to my own opinion on the subject.

ALDERSON, B.—I also think that the judgment in this case is right and should be affirmed. It depends on the *construction of stat. 1 & 2 Vict. c. 110, s. 59. That clause declares that, where an [*36 insolvent in contemplation of insolvency shall voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, any security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, &c., every such conveyance, assignment, transfer, charge, delivery, and making over shall be deemed and was thereby declared to be fraudulent, and void against the provisional or other assignee of such insolvent. Now what do the Legislature mean by this enactment? If we take the literal meaning of the words they use, those words imply that such conveyances, &c., shall have no more effect than conveyances, &c., actually void and made under circumstances of actual fraud would have had; and I have long been taught that this is the true mode of construing an Act of Parliament, unless it leads to a contradiction or absurdity. And why should we not in this case therefore give full effect to the literal meaning of the words? Does any contradiction or absurdity follow from so construing them? On the contrary, is not such a construction most in accordance with the general objects of the Act, and most just and reasonable? These are all acts which directly diminish the amount of the estate of the insolvent divisible amongst the body of creditors; and the assignee is the trustee for that body. If we make the conveyance only voidable at his election, we give to a trustee the power at his discretion to diminish the property of his cestuis que trust. I do not think it necessary to advert to the singular case put in the judgment by my brother Crowder; for really it is so improbable (not to say impossible) that such a collection of *remarkable events should ever meet together that it seems to me to be [*37 very unreasonable to use such a possibility as a ground for our decision. It cannot be said, if we do so, ad ea quæ frequentiùs accidunt jura subveniunt. If however the words "fraudulent and void" are construed literally, the consequences I have pointed out will not follow. It will be found that, in most if not all of the cases, where that which is declared

to be void is held to be voidable at the option of the party aggrieved, the fact is that it is in his option where it may be reasonably probable that it will be for his advantage to omit to declare it void, and to retain it as valid. Thus, in the case of a lease, the lessor may exercise the option of avoiding it or not; for there it may often be for his advantage not to avoid it; and he, acting for himself, may reasonably judge of that. But I think it would be a strange construction in the case of a mere trustee, whose duty it is to act in one way only, to construe the words as giving him what would be in the nature of an option illusory altogether. I think therefore that here "void" means "absolutely void," and not voidable at the option of the assignee of the insolvent. Then from what period is it to be void? It seems to me it must be void from the time of the act done or conveyance made. By so holding we can alone give it full effect. The whole of the operation of the provision would be lost unless we held that the effect begins at the time of the fraudulent and void act done, and does not commence with the appointment of the assignee. It is the same, as soon as an assignment has been made, as if the property had been still in the insolvent, and the possession only changed of the property from the insolvent to the defendant, with this additional circumstance, that all intermediate acts
*38] done *by the defendant inconsistently with this mere possession are acts tortious on his part. If, therefore, the property remains unchanged in his possession, he is liable to no action on the part of the assignee till the assignee has demanded and been refused possession of it. After that, trover will lie for it; for the refusal is inconsistent with the assignee's right of property. But a demand and refusal are only necessary, as evidence of a conversion, where there has been no other conversion before. If there has, as here is the case, the action of trover will lie without anything more done on the assignee's part. That is the case here; and the action well lies against the defendant. Though the insolvent may have had the right lawfully to deliver possession of the goods to the defendant, yet the act of defendant in disposing of and exercising the right of property over them was unlawful: and he cannot set up that it was lawful as being done by the assent of the insolvent, the then apparent owner; for the statute has made that act an unlawful one, as being fraudulent and void against the subsequently appointed assignee. I do not think it necessary to go further after the opinions already delivered by my learned Brothers, or to go through in detail the cases which have been cited and discussed. I have been permitted to see the judgment of my learned brother Cresswell, who has immediately preceded me; and I agree with and can add nothing to his observations upon this part of the case.

I am of opinion that the judgment below is right, and ought to be affirmed.

Jervis, C. J.—I think it very clear that the adjudication was pro-

perly admitted in evidence. It proves that the insolvent was ordered to remain in custody for a *year; and this, in connexion with the discharge by the defendant, was material to show that the insolvent and the defendant were acting in concert during the whole transaction, and therefore that the warrant of attorney was fraudulent and voluntary on the part of the insolvent, a question which is raised by the first plea and by the replication to the 4th. [*39

I also think it clear that there was evidence to go to the jury on the issue on Not Guilty to the 1st count, and on that joined on the replication to the 4th plea.

But the main question, which arises as well on the record as on the evidence under Not Guilty, is, Whether the allegation that the defendant wrongfully converted the goods of the bankrupt appears by the facts stated on the record or by the evidence. There is indeed evidence of the defendant concurring in, and being cognisant of, the fraud; still this is not alleged on the record; but, as it appears to me that fraud by the insolvent, whether concurred in or not by the defendant, is all that is requisite to call into operation the enactment of the statute in question, it is not necessary further to advert to this; but it will suffice simply to consider the case of a warrant of attorney voluntarily given by an insolvent under the circumstances provided for by the statute—in other words to consider the case as it appears on the record. The facts of that case are, that the defendant seized and sold the goods of the insolvent under a writ of execution on a judgment, founded on a warrant of attorney, voluntarily given by the insolvent, being in insolvent circumstances, within three months before his imprisonment, and with the view of petitioning for his discharge. Such a state of facts is clearly within sect. 59 of stat. 1 & 2 Vict. c. 110, *which provides that all charges, &c. (which it is admitted include warrants of attorney), made under such circumstances shall be fraudulent and void as against the assignee. These facts, in conjunction with the enactment of the statute, show that the defendant, without any right, has sold the goods of the insolvent, which is a clear wrong against his assignees, for which the proper remedy is an action. If a special action on the case were brought, the declaration would show the facts as above mentioned, and, as I conceive, would clearly show a wrong to the plaintiff. As the record now stands, the same facts appear; not indeed all in the declaration, but in the declaration, plea, and replication; and it seems to me that this is the correct way of placing them on the record. What the assignee complains of is the disposal by the defendant of the goods of the insolvent: he may not know under what circumstances, or pretence, the defendant acted; and he cannot know whether the defendant will set up this or that particular defence. In fact, the defendant in his plea sets up the judgment, which is a good primâ facie answer to the declaration; and the replication shows that the judgment relied [*40

on is void by the statute, as against the plaintiff; so that the declaration, which shows a clear right of action, remains in effect unanswered. It is true that the bankrupt could not himself have maintained an action for this conversion; but that is because he could not impeach a transaction in which he had himself concurred; but, though he cannot, the assignees can; and his concurrence, so far from being a bar to them, is the very ground of their right to complain of what has been done. There is no such rule as that an assignee can only maintain an action where the insolvent or bankrupt could have done so. Indeed, when an *41] *assignee can maintain an action for a wrong, which the bankrupt or insolvent could also have maintained, this right of the assignee does not arise because the bankrupt would have sued, but because the estate of the bankrupt or insolvent is injured. If that be not injured, or if such injury be not the main ground of action, the right does not pass to the assignee.

It is objected, however, to the plaintiff's right to recover, that a demand and refusal of the goods was necessary before the action could be brought; and for this the cases of Nixon *v.* Jenkins, 2 H. Bl. 135, and Jones *v.* Fort, 9 B. & C. 764 (E. C. L. R. vol. 17), have been cited. But these cases do not seem to me to show that any demand was necessary in the present case. In Nixon *v.* Jenkins the defendant had bought of the bankrupt certain goods, which the bankrupt sold in fraud of his creditors; all that the defendant did was to receive and hold the goods so sold. His receipt of them was therefore lawful; and the mere holding of them, without any assumption of dominion over them, or any disposition of them by consuming or selling them, was no conversion, and indeed no wrong against the assignees or any one else. The defendant was in a situation of a mere lawful bailee of the goods, which, for anything that appeared to the contrary, he was ready to deliver to the true owner (the assignee), if he wished for them. If the goods had in that case, as in this, been sold by the defendant, it would have been idle, after that actual conversion, to make a demand which could not be complied with; a refusal to deliver goods which a man has in his possession is in general to be taken as an assertion and exercise of a *42] *right of property in them, and therefore a conversion: but, if the goods are once out of the possession or power of the person from whom they are demanded, the refusal is no conversion. In the other case, of Jones *v.* Fort, the bankrupt delivered bills by way of fraudulent preference to a creditor, who held them till maturity, and then received the money for them; and the Court held that there was no conversion, inasmuch as the defendant, being lawfully in possession of the bills, did no more than his duty in obtaining the money for them at maturity: and it was said in that case that to maintain the action there should have been a demand and refusal before the bills were paid; and the Court gave judgment for the defendant. The ground of that

judgment was that there was no evidence of a conversion: and certainly the mere receipt of the money due on a bill, by a person lawfully holding it at maturity, is no wrong to any one, but what he ought to do for the benefit of whosoever may be entitled. In that case, also, if there had been an actual conversion, as if the defendant had sold or destroyed the bills before maturity, no demand would have been necessary. This is clearly pointed out in the judgment of the court delivered by Lord Tenterden. "In this form of action they cannot recover without proving an actual conversion or a demand (made within proper time) and a refusal, which are evidence of a conversion:" clearly showing that if there had been an actual conversion no demand would be necessary. It would, indeed, be most inconvenient to hold that a demand was necessary to defeat a fraudulent conveyance, when there had been an actual conversion. It may *well be that the assignee knows only that the goods of the insolvent had been seized and converted, but knows nothing of the fraudulent charge or conveyance, under colour of which the defendant may claim, till it is set up on the record; and if a demand before action be necessary he must be defeated in that action, and bring another after making a demand; but in fact there is no authority or principle in favour of this view. It seems to me, therefore, that in this case the absence of a demand is no defect in the plaintiff's title to bring the action. On the part of the defendant great reliance was placed on the case of Brook *v.* Mitchell, 6 New Ca. 349 (E. C. L. R. vol. 37). That case appears to have been rightly decided (though a part of the language reported to have been used by the Chief Justice may be questioned), but not to be applicable to the present case. That case and the present were on two very different statutes. Brook *v.* Mitchell was on stat. 3 G. 4, c. 39, which applies to warrants of attorney only, its object being to cause them to be filed, by subjecting them, if not filed, to the penalty of being fraudulent and void against the assignees. The object of that statute is to prevent frauds on assignees, by creditors holding warrants of attorney and keeping them secret, however honestly given by the bankrupt. The only way in which such warrants can prejudice assignees is by having judgment signed and execution levied under them before the bankruptcy; and the effect of the 2d section is to make such execution void against assignees; and the section goes on to provide in what manner the assignees may avoid the execution; that is, by recovering the money levied on the goods seized, thus confining the *remedy when the goods have been sold to an action for the money, and so excluding an action of trover. In every case within this section the sheriff must be a party; and it may well be that the provision in question was inserted with a view to exempt him from liability as a wrongdoer for the mere act of seizure, a position in which it is evidently desirable that he should not be placed, though it may be unavoidable in some cases. The pre-

[*43

[*44

sent case depends upon a very different enactment from that of stat. 3 G. 4, c. 39. Statute 1 & 2 Vict. c. 110, s. 59, is directed to frauds by the insolvent, not the creditor, and to all kinds of conveyance or disposition of his property, not to executions only. The sheriff may or may not be a party in carrying the fraudulent purpose into effect. The frauds intended to be dealt with are of so general a nature that it would not be possible, at least it would be very difficult, to point out a particular or appropriate remedy in every case: accordingly, no specific remedy is given for money or goods; the transaction is declared void; and the consequences are left to be determined by the general law applicable to fraudulent and void transactions. In the judgment in Brook *v.* Mitchell, as reported in 6 Bingham's New Cases, it is expressly stated that the plaintiff's remedy, if any, is under the statute for money had and received, or a special action. In this I entirely agree, and think the case rightly decided on that ground, inasmuch as it appears to me that the true construction of stat. 3 G. 4, c. 39, and that on which the Court proceeded in Brook *v.* Mitchell, is that the warrant of attorney, if not duly filed, shall be void, so as to give the assignees a right to "recover back and receive" "the moneys levied
*45] or *effects seized," that is, to have the one or the other according to the circumstances of the case; so that if the sheriff have sold the goods and paid over the money to the judgment-creditor before notice of the assignee's title, he will be liable to no action, but the creditor will be liable to refund the money, and may be compelled to do so by an action for money had and received. If the sheriff have the goods in his possession he will be bound to give them to the assignees on demand; or if he refuses or sells them he will be liable in detinue or trover. In conformity with this view, in the case of Biffin *v.* Yorke, 5 M. & G. 428 (E. C. L. R. vol. 44), the money levied by the sheriff under a warrant of attorney, not duly filed and paid by him to the execution-creditor before the insolvency, was recovered by the assignees in an action of debt against the execution-creditor for money had and received; and in Dillon *v.* Edwards, 2 M. & P. 550, which was also a case of a warrant of attorney not duly filed under stat. 3 G. 4, c. 39, where the sheriff, after the bankruptcy, refused to give up the goods seized to the assignees who demanded them, and afterwards sold them, the assignees recovered in trover against the sheriff. It is said, in the judgment in Brook *v.* Mitchell, "Upon no legal construction, therefore, can the allegation be supported that there was any wrongful conversion before the bankruptcy." If this language is merely intended to show that the assignees, in that case, had not stood in the situation of persons deriving a right to sue in trover, for the bankrupt, in respect of a right to such action vested in him before his bankruptcy, there is no reason to dispute it; but, if it is to be understood, as it must be to

be applicable to the *present case, that an action of trover can never be maintained by assignees unless where the bankrupt could [*46 maintain it, I do not agree with it: it is contrary to the case of Jackson *v.* Thompson, 2 Q. B. 887 (E. C. L. R. vol. 42), and, I think, reason and principle. Where the goods of the bankrupt are appropriated by the defendant, without any right or pretence, or without any which the assignees may not treat as null and void, the assignees, as it seems to me, are wronged by such conversion, and that they accurately stated their wrong in alleging that the defendant took the goods of the bankrupt or insolvent and converted them to his own use. It may be observed that in the above-mentioned case of Jackson *v.* Thompson the assignees recovered in trover against the defendant, who held under a deed fraudulent within sect. 59 of stat. 1 & 2 Vict. c. 110. In that case no doubt was entertained that the action of trover did lie; nor was any demand and refusal contended to be necessary. I am of opinion, therefore, that the judgment for the plaintiff ought to be affirmed.

I have only further to add that I have, by the permission of my brother Sir William Maule, read the judgment which he had prepared to deliver in this case, because I was unwilling that the parties should lose the weight of his very high authority, and because he expresses, far better than I could do, the reasons which have led him to arrive at the same conclusion as myself. Judgment affirmed.

*IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

FAITHFUL CROFT *v.* BENJAMIN LUMLEY, LORD WARD, and Sixteen Others. *Feb.* 20.

This case is reported, together with the case in the Queen's Bench, 5 E. & B. 682 (E. C. L. R. vol. 85).

HILTON *v.* ECKERSLEY. [*June* 20, 1855.]

A bond was made by eighteen persons, in which each obligor was described as a cotton spinner of W. or of H., and by which each was bound to plaintiff in a separate sum of 500*l.* The condition recited that the obligors were respectively owners of spinning mills in W. and H., and employed in them many workpeople; that there were societies and combinations among divers persons, whereby persons, otherwise willing to be employed, were deterred by fear of social persecution and other injuries from hiring themselves to work, and whereby the legal control of the obligors of their property was injuriously interfered with; that these combinations were sustained by funds arbitrarily levied and extorted by way of tax or rate on the persons employed by and receiving wages from the obligors; and, in the opinion of the obligors, it had become necessary to take measures for vindicating their legal rights to the control of their property, which would also best sustain the rights of the labourer to the free disposal of his skill and industry: therefore the obligors had agreed to carry on their works, in regard to the amount of wages, the times of the engagement of workpeople, the hour of work, the suspending of work, and the general discipline and management of their works, in conformity to law, for twelve calendar months, in conformity with the resolutions of a majority of the obligors present at any meeting to be convened: that, for the purpose of carrying the agreement into effect, the obligors entered into the bond: and the condition was that, if the obligors, for twelve calendar months, should carry on, or wholly or partially suspend carrying on, their works, in regard to the matters aforesaid, in conformity with the resolutions of a majority of the obligors present at a meeting to be held as mentioned, then the bond, as to each person so performing, to be void; and the days, place, and other circumstances of the proposed meeting were set out; the obligor to hold the money recovered in trust for all the obligors; with power for a majority of the obligors present to release the obligors from performance.

An action being brought on this bond against one of the obligors, he, by plea, set out the bond and condition, and alleged that there was no consideration except as appeared by the condition.

On demurrer to the plea:

Held, by Lord Campbell, C. J., and Crompton, J., dissentiente Erle, J., that the bond was void as being in restraint of trade; and judgment was given in Q. B. for defendant.

Judgment affirmed in Exch. Chamber.

ACTION on a bond for 500*l.*, of which plaintiff was obligee and defendant obligor.

*48] *The plea set out the bond, whereby William Johnson, of Wigan in the county of Lancaster, cotton spinner, Nathaniel Eckersley (defendant), cotton spinner and manufacturer, and eleven others, each described as cotton spinner or spinster, and one also as manufacturer, all of Wigan aforesaid, and five others, each described as cotton spinner, all of Hindley in the county of Lancaster, were respectively and separately bound to Caleb Hilton (plaintiff), of Wigan aforesaid, attorney at law, in 500*l.*, subject to the following condition.

"Whereas the above bounden William Johnson, Nathaniel Eckersley," &c. (naming the eighteen obligors), "are respectively owners or occupiers of mills and premises in Wigan and the neighbourhood, in the county of Lancaster, for the spinning and manufacturing of cotton, yarn, and cloth, and employ therein many workpeople and servants; and whereas there are certain societies, or combinations, or implied arrangements, or understood agreements, subsisting in the said county amongst divers persons, whereby persons otherwise willing to be employed in the said works are deterred, by a reasonable fear of social persecution and other injuries, from hiring themselves to work in the

said establishments, and whereby the legal control and management of the said obligors (*a*) of their property and establishments are injuriously interfered with; and whereas the said combinations are sustained by funds arbitrarily levied and extorted by way of tax or rate upon the persons employed by the same obligors respectively, and receiving wages from them; and it hath *become necessary in the opinion of the said obligors to take measures for vindicating their legal rights [*49 to the control and management of their own property; which will also best sustain the rights of the labourer to the free disposal of his skill and industry: and therefore the said several obligors have agreed to carry on their said works, in regard to the amount of wages to be paid to persons employed therein, and the times or periods of the engagement of workpeople, and the hours of work, and the suspending of work, and the general discipline and management of their said works and establishments in conformity to law, for the period of twelve calendar months from the date of the above written bond, in conformity with the resolution of a majority of the said obligors present at any meeting to be convened as hereinafter mentioned: and, for the purpose of carrying the said agreement into effect, the said obligors have entered into the above written bond or obligation, conditioned as hereinafter mentioned: Now the condition of the above written bond or obligation is such that, if the said several obligors, and their respective partners in the business carried on at the said works, shall, for the period of twelve calendar months from the date of the above written bond or obligation, carry on and conduct, or wholly or partially suspend the carrying on of, their said works and establishments, in regard to the several matters aforesaid, in conformity with the resolutions in that behalf of a majority of the said obligors present at a meeting to be held as hereinafter mentioned, then the above written bond or obligation, in regard only of the persons respectively so performing this condition, shall, as to the sum of 500*l*., in which he is bound, become void, or otherwise the same to remain in full force. *And it is hereby declared that, on the 3d and 8th days of October instant, meetings of the said obligors [*50 were held at the Victoria Hotel, at the hour of four in the afternoon; at which meetings a chairman and secretary were appointed; and which said meetings had authority to make, and did make and prescribe, times, rules, and regulations for the holding and conducting of ordinary meetings and the convening of special meetings; and which times, rules, and regulations may, at any ordinary or special meeting, be varied or rescinded, and others substituted; and all resolutions agreed to by a majority of the obligors present at any such meeting shall be deemed the resolutions of the said meeting; and every meeting so held as afore-

(*a*) Throughout the condition, the word "obligees" was written instead of "obligors." The plea set out the condition as it was written, but no point was made in consequence of this mistake, the case being argued as if the condition had been correctly written; and the text is corrected accordingly.

said shall be deemed to be a meeting within the meaning of the above written condition. Provided always, and it is hereby declared, that all moneys which shall be received by the said Caleb Hilton, his executors or administrators, upon the above written bond shall be held by him or them in trust for the equal benefit of all the obligors, their respective executors, administrators, and assigns. Provided also that the said bond shall not be put in suit without the consent of a majority of the said obligors present at a meeting to be held as aforesaid. Provided, also, that it shall be lawful for a majority of the said obligors present at any such meeting to pass a resolution releasing and discharging the said obligors respectively from the further performance of the said condition. In witness," &c. Allegation that, save as appears by the said condition, there was no consideration for the execution of the said bond by the defendant. And that, by reason of the premises, the said bond was and is a bond in restraint of trade, illegal and void.

Demurrer. Joinder.

*51] *The case was argued in the Court of Queen's Bench, in last Easter Term,(*a*) by *Cowling* for the plaintiff and *Mellish* for the defendant. It is considered sufficient, for the argument, to refer to the argument in the Exchequer Chamber and the judgments delivered in the two courts. *Cur. adv. vult.*

On this day, there being a difference of opinion upon the Bench, the learned Judges delivered judgment seriatim.

CROMPTON, J.—In this case the plaintiff declared upon a bond for 500*l.* The defendant in his plea set out the bond; by which it appeared that the defendant and seventeen others were bound to the plaintiff, each in a separate and distinct sum of 500*l.* The plea then set out the condition of the bond; whereby, after reciting that the obligors were respectively owners of mills, in Wigan and the neighbourhood, for spinning and manufacturing, and employed therein many workpeople and servants, and that there were certain societies or combinations amongst divers persons, whereby persons, otherwise willing to be employed, were deterred by fear of social persecution and other injuries from hiring themselves to work, and whereby the legal control of the said obligors of their property was injuriously interfered with; and that, whereas the said combinations were sustained by funds arbitrarily levied and extorted by way of tax or rate upon the persons employed by the said obligors and receiving wages from them, and it had become neces-

*52] sary, in the opinion of the said obligors, *to take measures for vindicating their legal rights to the control and management of their own property, which would also best sustain the rights of the labourer to the free disposal of his skill and industry; and therefore the said several obligors had agreed to carry on their said works, in regard to the amount of wages to be paid to persons employed therein,

(*a*) April 27th, 1855. Before Lord Campbell, C. J., Erle and Crompton, Js.

and the times or periods of the engagement of workpeople, and the hours of work, and the suspending of work, and the general discipline and management of their said works and establishment, in conformity to law, for the period of twelve calendar months from the date of the above written bond, in conformity with the resolutions of a majority of the said obligors present at any meeting to be convened; and after reciting that, for the purpose of carrying the said agreement into effect, the said obligors entered into the above written bond: the condition of the obligation was declared to be that, if the said several obligors and their respective partners should, for twelve calendar months from the date of the bond, carry on and conduct, or wholly or partially suspend the carrying on of, their said works and establishments in regard to the several matters aforesaid in conformity with the resolutions in that behalf of a majority of the said obligors present at a meeting to be held as mentioned in the agreement, then the above-written bond, in regard only of the persons respectively so performing this condition, should, as to the sum of 500*l.* in which he was bound, become void; or otherwise the same to remain in full force. The condition then proceeded to state the days and place of meeting, and that all resolutions agreed to by a majority of the obligors present should be deemed the resolutions of the said meeting, and that every *meeting so held should be held to be a meeting within the meaning of the above written condition: also that the plaintiff should hold all moneys recovered by him in trust for all the obligors, &c.: provided that the bond should not be put in suit without the consent of a majority of the obligors present at a meeting: provided, also, that it should be lawful for a majority of the said obligors present to pass a resolution releasing the said obligors respectively from the performance of the said condition. The plea then stated that, except as it appeared by the condition, there was no consideration for the execution of the bond by the defendant; and that the bond was in restralnt of trade, illegal and void. [*53

The plaintiff having demurred to this plea, the demurrer was argued before us in the course of last Easter Term. And the question for our consideration is, Whether a bond of this nature can be enforced at law.

I am of opinion that the bond is void, as being against public policy. I think that combinations like that disclosed in the pleadings in this case were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture. The precedents of indictments for combinations of two or more persons to raise wages, and for other offences of this nature, which were all framed on the common law and not under any of the statutes on the subject, sufficiently show what the common law was in this respect. In Rex *v.* Mawbey, 6 T. R. 619, 636, Grose, J., assumed the illegality of such combinations as well known law. Combinations of this nature, whether on

the part of the workmen to increase, or of the masters to lower, wages were equally illegal.

*54] *By recent enactments, carefully worded, combinations to raise or lower the rate of wages, and to regulate the hours of labour, are made no longer punishable. But these enactments do not make such combinations legal agreements in the sense that the breach of them can be enforced at law; and still less do they apply to make enforceable at law an agreement, not being a mere stipulation among the parties themselves which any one might withdraw from at his pleasure, but binding and tying themselves up, under a penalty, to close their works if a majority of a particular body shall dictate to them so to do. I think this bond void, as being in restraint of the freedom of trade, and from its mischievous and dangerous tendency, pointed out in the argument, with respect to strikes and combinations. The general principle of contracts in restraint of trade being void is perfectly well established: and this case does not appear to me to fall within any of the exceptions and relaxations which have been allowed as to that principle.

Most of such cases have occurred where one party has sold a trade or profession to another, or where one party has learned the trade and its secrets from the other, and where, on such considerations, stipulations have been entered into whereby the one party undertakes not to exercise the trade or profession within reasonable limits as to time and distance. In the present case, the agreement is that, in a certain event, all the parties contracting are to close their works. And the consideration of the promise of each is the promise of the others likewise to close their works. So that the public are not recompensed for

*55] the ceasing of one party by the other parties being able to carry on their trade with *increased facilities. It is, I believe, the first case where the mutually abstaining from trade has been the consideration for a bond of this nature. The case of a bond, whereby a number of persons, who manifestly appear to constitute a great body of master manufacturers, mutually bind themselves to close their works at the will of the majority present at a meeting, and whether or no they individually think it right or desirable so to do, seems to me entirely beyond any relaxation that has ever been made of the general rule applicable to agreements in restraint of trade. Here, instead of the arrangement being that one party shall not carry on trade in order that another may do it more advantageously, the object is that all shall close as a means of compulsion against the workmen.

One of the most objectionable parts of this bond is that it takes away the freedom of action of the individual to carry on the trade, and to open and close his works according as it may be for his interest or that of the public. It appears to me obviously mischievous that the parties should give up this right of judging for themselves, and place themselves

and their trades under the dictation either of a majority or of a committee of delegates, which seems the same in principle.

The agreements or combinations allowed, or rather rendered not punishable, by the modern Acts of Parliament are much less mischievous, and seem less contrary to the free course of trade, if every party can withdraw from the association at his free will and pleasure. And it is accordingly permitted by the Legislature that either masters or workmen may join in agreeing to work or be worked for according to certain rates or times. At least the Legislature has sanctioned this, so far as to prevent *its being punishable. But, as soon as the party agrees [*56 to bind himself by penalties to give up his right of retiring from such combination, that freedom of trade which it is the policy of the law to protect seems directly interfered with. Suppose, in the present case, that the workmen agree to proper and reasonable terms, and that the majority still insist on closing: the individual obligor is bound to shut up his own mill, and to be in effect a party to the closing of seventeen others, although he is perfectly satisfied that in doing so he is acting contrary to his own interests, as well as to the interests of the workmen, the trade, and the public.

The same observation applies to the case of the workmen themselves. If this bond is legal, in the sense of being enforceable at law, a promise on the part of any individual workman not to retire from the strike, or to pay a weekly subscription to it, or to pay a penalty if he went to work without the leave of the majority of a meeting, or disobeyed the dictation of the delegates, would be binding upon him: and no workman would be able to free himself from the tyranny of such dictation, whatever might be the state of his family, however reasonable he might think the offer of his masters as to wages, and although he might be perfectly satisfied, in his own mind, that the longer continuance of the strike was ruining himself, his family, and his fellow workmen, and was doing incalculable injury to the public.

It is said, indeed, that the object of the bond is to defend the parties, and to enable them to meet the combination of workpeople. But I think that agreements of this nature, on the one side or other, or both, really tend to prolong the mischief: and, however right it may be that the masters or workmen should respectively *stand by and assist [*57 each other in resisting what they consider unfair demands, yet that the giving up their individual right of judging and acting for themselves in matters so greatly affecting the public is mischievous and dangerous in the extreme. I think it not to be endured that majorities and delegates, of workmen or masters, should in effect be allowed to legislate upon questions immediately affecting the happiness of the working classes and the prosperity of the trade and commerce of the whole nation.

If agreements like the present were enforceable at law, I see no rea-

son why (as observed by Mr. *Mellish*) they should not be enforceable in equity: and our Courts of equity might be called upon to enjoin masters against opening their mills, or workmen from going to work or discontinuing a strike; whilst our county courts would have to make decrees for the contributions to strike, or to enforce penalties from workmen who have felt it their duty to resume employment.

It was contended, on the part of the plaintiff, by Mr. *Cowling*, that some part of this agreement might be good, and that the bond, with reference to such part, would not be invalid. But I think that the illegality pervades the whole agreement, and that, part of the consideration of the bond being that the works should be closed according to the dictation of the majority, the whole instrument is illegal, even if part of the engagement of each obligor were held according to Mr. *Cowling's* argument to be legal.

I am clearly of opinion that the whole instrument is tainted with illegality; and I therefore think that our judgment ought to be given for the defendant.

*58] *ERLE, J.—The question, whether the bond declared on is void, is raised under the circumstances appearing in the condition: which recites that the obligors are manufacturers in Wigan and Hindley, and that combinations of workmen, preventing free labour by fear of social persecution, injuriously interfere with the management of their manufactories; and that these combinations are sustained by funds extracted from workmen employed by the obligors; and that measures are necessary to protect as well the obligors in the free management of their capital as the workmen in the free disposal of their labour: wherefore the obligors have agreed, in regard to the amount of wages, the periods of engagement, the hours of work, and the general management of their establishments, to act in conformity with the lawful resolutions of a majority of the obligors present at a meeting; and declares that the bond shall be void if this agreement is performed. The masters have thus contracted to co-operate for the protection of their interests against injurious results from existing combinations of workmen.

It was contended that this agreement was unlawful, on account of being in restraint of trade. But, according to the recital, the purpose of the agreement and its tendency was for the advancement of trade. The workmen, by combining not to work for one master while they are supported by wages from the others, may ruin each separately: and, unless the masters can protect themselves more effectually than by indictment, there is danger of the trade being destroyed, and the capital being removed from the neighbourhood or from the country to a more secure place. Also, as the agreement is to act in conformity with

*59] the resolutions of the *majority, and those resolutions may require the business to be carried on to the fullest possible extent, the

agreement ought not to be held void as in restraint of trade unless it was shown by averment that it do so operate.

Even if the agreement was construed to be in restraint of trade because it interfered with the free will of the masters in their management, still it does not follow that it is illegal; as agreements in restraint of trade are legal if required for the protection of the lawful interests of the contracting parties. Thus, masters may contract to restrain their servants and apprentices from trade in a certain neighbourhood. So also the purchaser of the good-will of a business may restrain the vendor from trading within a certain area: and the landlord of a house may restrain his lessee from trade therein, if it would be likely to lower the value of the property. The right to agree for a restraint of trade on account of the protection of a lawful interest is fully explained in Hitchcock *v.* Coker, 6 A. & E. 438 (E. C. L. R. vol. 33), and Mallan *v.* May, 11 M. & W. 653.† In the present case the obligors are shown by the recital to have an important interest, for the protection of which this agreement was necessary; and there is no reason for saying that the restraint was greater than was required for that protection.

The opinion that this agreement is valid at common law derives confirmation from a consideration of the statute law. The Legislature, by various statutes, from the reign of Ed. 1 to that of G. 4, prohibited agreements, either of masters or of workmen, for the purpose either of lowering or raising wages, or of altering hours, or otherwise affecting their mutual relations. These *agreements were by some statutes enacted to be, and by others declared to be, illegal; and the [*60 parties entering into them were liable to punishment. By stat. 6 G. 4, c. 129, an entire change of the law was made. By sect. 2 all the statutes prohibiting such agreements are enumerated and absolutely repealed. By sect. 3 future prohibition is confined to endeavours, by force, threats, intimidation, molestation, or obstruction, to affect wages or hours, which are made illegal and punishable: and, by sects. 4 and 5, it is declared that neither masters nor workmen shall be punishable for any agreements in respect of wages or hours unless they infringe the prohibitions in the 3d section.

Since this statute, such agreements as the present, if illegal, must be made so by the common law. But no principle or decided case has been adduced showing such to have been the law before these statutes passed: and it seems to me that the Legislature intended by this statute to make all agreements to which it relates legal, if not comprised within the section of prohibition; the statute repealing, as well the clauses of former statutes which render these agreements illegal, as those that made them punishable.

The Judges, in expounding this statute, have used language denoting that in their opinion the agreements either of masters or of workmen

respecting wages or hours are legal: and, if an agreement is legal, it follows that it may be enforced by law. I refer to the charge of Tindal, C. J., in Regina *v.* Harris, Car. & M. 661, note (*a*), and the summing up of Rolfe, B., in R. *v.* Jones and Others,(*a*) and of Erle, J., in
*61] *Regina *v.* Rowlands, 17 Q. B. 671, 686, note (*b*) (E. C. L. R. vol. 69); 2 Den. C. C. R. 388, note (*a*), with the judgment of Patteson, J., thereon in Rowland's Case, 2 Den. C. C. R. 389, note (*a*).

Considerations of policy confirm this view of the law. It is supposed that attempts to affect wages by intimidation would be more rare, and that the misery resulting from strikes would be diminished, if it was held that no agreements for the purpose of affecting wages or hours should be enforced by the law. But it seems to me that the opposite effect would result. If all such agreements were excluded from the law, I assume that they would still be made; because they were frequently made, even when prohibited under severe penalties, and are now in constant course: and the Legislature probably thought them irrepressible by prohibition. Then, if, when made, they cannot be enforced by law, the parties making them resort to social persecutions, fear and force for their enforcement: and, as the control, where law is excluded, frequently devolves upon men either unprincipled or ill informed, greater misery is caused by the control of such leaders than would arise from the sanctions of the law. If the agreements could be enforced by law, they would be made with a knowledge of rights and liabilities: and the enforcement of them would be within the limits of the law, and for the most part free from purposeless evil. If the law protected them, it would be for the law to decide whether they were in restraint of trade beyond what was required for the protection of any lawful interest; and, if so, to declare them void for the excess. While,
*62] on the other hand, if they should *be valid, they would be enforced only as far as they were judged to be reasonable.

Therefore, in my opinion, judgment should be for the plaintiff.

Lord CAMPBELL, C. J.(*b*)—I concur with my brother Crompton in thinking that there ought in this case to be judgment for the defendant. And, agreeing with him in most of the reasons he has given for his opinion, I have not much to add in support of it.

But I am not prepared to say that the combination which has been entered into between the parties to this bond would be illegal at common law, so as to render them liable to an indictment for a conspiracy. Such a doctrine may be deduced from the dictum of Grose, J., in Rex *v.* Mawbey, 6 T. R. 636: "As in the case of journeymen conspiring to raise their wages: each may insist on raising his wages, if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy." Other loose expressions may be

(*a*) Qu. Regina *v.* Selsby, note (*a*) to Rowland's Case, 2 Den. C. C. R. 384.
(*b*) This judgment was read by Crompton, J.

found in the books to the same effect: and, if the matter were doubtful, an argument might be drawn from some of the language of the statutes respecting combinations. But I cannot bring myself to believe, without authority much more cogent, that, if two workmen who sincerely believe their wages to be inadequate should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor and liable to be punished by *fine and imprisonment. The object is not illegal; and therefore, [*63 if no illegal means are to be used, there is no indictable conspiracy. Wages may be unreasonably low or unreasonably high: and I cannot understand why in the one case workmen can be considered as guilty of a crime in trying by lawful means to raise them, or masters in the other can be considered guilty of a crime in trying by lawful means to lower them.

Nor can I say that there is any statutable enactment which goes the full length of rendering this bond illegal and void. The 3d section of stat. 6 G. 4, c. 129, comes very near it, and shows the great dislike of the Legislature to such proceedings. For it is thereby enacted that, "if any person shall use or employ violence to the person or property of another, or threats or intimidation, *or shall molest or in any way obstruct another* for the purpose of forcing or inducing such person to belong to any club or association, *or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed or having refused to contribute to any common fund, or to pay any fine or penalty, or on account of his not having complied or of his refusing to comply with any* rules, orders, resolutions, or regulations" "to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof," every person so offending may be imprisoned and kept to hard labour for three calendar months. If suing upon such a bond could be considered as *molesting* or *obstructing* the obligor within the meaning of this section, the bond would be illegal and void. But the *molestation* and *obstruction* here contemplated would probably be considered to be an unlawful act of the same kind with those specifically described.

*I am therefore obliged to bring the bond within the category [*64 of written instruments which are not avoided by positive statute, and are not so far illegal at common law as that the framing of them is a criminal offence, but which cannot be enforced by action, being considered void as against public policy. I enter upon such considerations with much reluctance, and with great apprehension, when I think how different generations of Judges, and different Judges of the same generation, have differed in opinion upon questions of political economy and other topics connected with the adjudication of such cases. And I

cannot help thinking that, where there is no illegality in bonds and other instruments at common law, it would have been better that our Courts of Justice had been required to give effect to them unless where they are avoided by Act of Parliament. By following a different course, the boundary between Judge-made law and statute-made law is very difficult to be discovered. But there certainly is a large class of decisions, which will be found collected in the report of the recent Bridgewater Case in the House of Lords,(*a*) to the effect that, if a contract or a will is, in the opinion of the Judges before whom it comes in suit, clearly contrary to public policy, so that by giving effect to it the interests of the public would be prejudiced, it is to be adjudged void.

When I look at this bond, I have no hesitation in concluding that the association which it establishes ought not to be permitted, and that the enforcing of the bond will produce public mischief. I therefore feel compelled, as a Judge, to say that it is void. The object of the *65] *association of the master manufacturers of Wigan is very laudable to put down an illegal association of the workmen, the funds of which are arbitrarily levied by extortion, and to protect the just rights of the masters which have been infringed. But the means sought to be employed are such as I think the law will not sanction. There are agreements which, although to a certain degree in restraint of trade and of the free action of individuals, may be enforced by action: but I am not aware of any contract, so far in restraint of trade and of the free action of individuals as this bond, to which Courts of justice have given effect. I do not think that any averment is necessary as to what has been done under it, or as to any mischiefs which it has actually produced. We are to consider what may be done under it, and what mischiefs may thus arise. All the master manufacturers in a large district are obliged for a twelvemonth to carry on their trade in the manner in which a majority of them may direct; and during that time they may all be compelled entirely to shut up their manufactories and to dismiss their men: they are obliged to contribute to the funds of the association, and cannot withdraw from it although they may think that its object has been effectually gained, or however much they may disapprove of its proceedings. If such an association is good for such a district, it would be equally good for the whole county of Lancaster, or for the whole realm of England. And, if the will of a majority may be the rule of action for all who are associated, so may the will of a single individual. Again, there must be entire reciprocity between liberty to the masters and liberty to the men: and it seems to me that *66] a decision in favour of this bond would establish a principle upon *which the fantastic and mischievous notion of a "Labour Parliament" might be realized for regulating the wages and the hours of labour in every branch of trade all over the empire. The most disa-

(*a*) Egerton *v.* Earl Brownlow, 4 H. L. Ca. 1.

trous consequences would follow to masters and to men, and to the whole community.

I should have been much better pleased if a clear rule had been expressly laid down to me by the Legislature: but, being required to form and to act upon my own opinion, I am bound to say that I think this bond is contrary to public policy, and that we ought to give judgment for the defendant. Judgment for defendant.

IN THE EXCHEQUER CHAMBER.

Feb. 20.

The plaintiff below alleged error in the above judgment. The defendant denied the allegation.

The case was argued in last Michaelmas Term(*a*) and Vacation.(*b*)

Cowling, for the party alleging error (plaintiff below).—The plea containing no averment of fact, but relying on what appears upon the face of the bond and condition as set out, the facts recited must be assumed to be true. It does not appear that the obligors comprehend all the cotton manufacturers in the neighbourhood of Wigan and Hindley. It is shown that the association is purely *defensive, and that its object is to liberate the trade from a control by a combination of workmen. [*67 Such an object, at any rate, is not merely legal but praiseworthy. That, it is true, would not constitute a defence of the proceeding if the object were to be furthered by illegal means. But no such means appear. The number of the obligors is eighteen; but the obligation is not less legal than it would be if there were only three. Nor can any objection be urged against the duration of the obligation for twelve months which would not be valid if it were to last only for three. It is not, properly speaking, a bond in restraint of trade: there is no agreement either to give up or to suspend trade: that could have been done without any agreement. The trade is already suspended or checked; and the agreement is entered into for the purpose of enabling it to go on freely. [ALDERSON, B.—If the agreement had merely the effect of closing all the mills when there was a strike against a single mill, that should be shown: all that appears is that the steps to be taken were at the discretion of the majority.] The majority even of the obligors could not, under this agreement, suspend the trade for more than a few months. Nor is it to be necessarily inferred that any suspension will take place at all. [ALDERSON, B.—Do you say that, if there were no combination among the workmen, this association would be legal? If not, can one illegality cure another?] An illegal act may well render that legal which would be otherwise illegal, just as a poison may act as an antidote to another poison. [ALDERSON, B.—May you poison another

(*a*) November 16th, 1855. Before Williams, Crowder, and Willes, Js., and Parke, Alderson, and Platt, Bs.

(*b*) November 29th, 1855. Before the same Judges, and Cresswell, J.

because he means to poison you?] What acts medicinally is no poison at all. The plea of son assault demesne is a good answer to an action
*68] for an assault, *because a blow struck in pure self-defence is not a battery. It appears that Crompton, J., was much impressed by the circumstance that every obligor here gives up his private judgment in deference to that of the majority. But why should he not? He could not if, by his doing so, trade was restrained: but the contrary appears on this record. The association is for doing away with that restraint of trade which would otherwise be affected by the combined workmen coercing the single employers in succession. A joint resistance to this can be secured only by union; and it is essential to an union that it should be governed by the discretion of the majority. A partnership is guided by the will of the majority of partners. The public benefit is more likely to be secured by the government of a majority than by that of a minority. In Mallan *v.* May, 11 M. & W. 653,† where the covenant was held partly good, and partly bad as being in restraint of trade, the Court said that circumstances may exclude the presumption that a partial restraint of trade is bad; adding: "If there are circumstances recited in the instrument (or probably if they appear by averment), it is for the Court to determine whether the contract be a fair and reasonable one or not; and the test appears to be, whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided." The same doctrine may be collected from Egerton *v.* Earl Brownlow, 4 H. L. Ca. 1, and is laid down in Mitchel *v.* Reynolds, 1 P. Wms. 186.(*a*) In the instance of trading guilds, the majority had the control. [Alderson, B.—They were founded by the Crown.] Not invariably; there were voluntary guilds. And there are
*69] *many instances of associations acting with a public object, in which the majority governs. Such is the Stock Exchange Committee. Of course the plaintiff does not contend that the mere fact that the contract is not criminal is sufficient to show that it may be enforced in law. [Alderson, B.—Suppose a set of manufacturers entered into a bond conditioned for keeping their mills closed during the prevalence of cholera.] That could not be illegal. [Alderson, B.—Suppose the condition were for obeying the regulations of a sanitary committee?] Why should that not be done? There can be no prejudice to public interests from the selection of a competent directing authority. Joint owners of a ship ordinarily contract for the employment of the ship according to the will of the majority. Parties may agree to be bound by the award of an arbitrator or the certificate of an engineer; and the agreement will be enforced. Crompton, J., appears to have considered that this is in the nature of a combination to lower wages; but it is in fact a combination for putting down a strike. The

(*a*) See note to S. C., 1 Smith's Lea. Ca. 301 (4th ed.).

language of Grose, J., in Rex *v.* Mawbey, 6 T. R. 636, has been referred to. But, when that case was before the Court, the law was not as it is now: the Legislature had in numerous instances fixed the rate of wages: a combination for the purpose of raising wages was then illegal; Rex *v.* Journeymen Tailors of Cambridge, 8 Mod. 11. In stat. 23 Ed. 3, cc. 1, 2, 3, are found early restraints of this kind; a later act, stat. 5 Eliz. c. 4, s. 15, which was before the Court in Rex *v.* Hulcott, 6 T. R. 583, was repealed by stat. 53 G. 3, c. 40.(*a*) Numbers of similar statutes are repealed by stats. 5 G. 4, c. 95, and 6 G. 4, c. 129. The modern policy of the *Legislature may be collected from a speech [*70 of Mr. Huskisson, made at the time when the matter was under the consideration of a committee of the House of Commons.(*b*) The object has certainly been to allow of combinations, but to check unjustifiable dictation. The language of Rolfe, B., in Regina *v.* Selsby,(*c*) and of Erle, J., on the trial of Regina *v.* Rowlands,(*d*) asserts the legality of combinations to raise wages, and is not confined to the question of the legal criminality of such combinations. [ALDERSON, B.—In one of the prohibitory statutes, 39 & 40 G. 3, c. 106, s. 1, the contract is made void: that is rather in your favour, as showing that the contract was not void at common law. CROWDER, J.—Was there any necessity here for the time being so defined that it might continue after the combination of the workmen should be at an end?] It is not easy to say when a combination is at an end: and, if no limit were named, the agreement would be objectionable as being perpetual. [ALDERSON, B.—Could a suit be maintained against a workman, in a county court, for breach of the agreement to combine, on the ground that the agreement was a measure of defence against a combination of masters?] The judge would decide, as matter of fact, whether it was a defensive measure. [ALDERSON, B.—Suppose twenty electors enter into a bond to vote for a particular candidate, on the ground that there is a similar combination in favour of the opposite candidate.] That is a breach of what the law considers a duty, namely, giving a free vote.

**Mellish*, contrà.—The question is, not whether such a contract [*71 is punishable criminally, but whether it can be enforced. Whether it operates in restraint of trade must be determined, not from the object of the transaction, but from the effect of the instrument itself. Every stipulation in the condition is in restraint of trade. There does not appear to be any power given to the majority enabling them to compel an obligor to keep his mill open, or to give wages up to a certain amount; they can compel only the closing of the mills and keeping the wages down. That construction follows from the recital of the sup-

(*a*) Other clauses were repealed by stat. 54 G. 3, c. 96.
(*b*) 13 Hansard's Parliamentary Debates, N. S. 354, 5.
(*c*) Note (*a*) to Rowlands' Case, 2 Den. C. C. R. 384.
(*d*) Note (*b*) to Regina *v.* Rowlands, 17 Q. B. 666 (E. C. L. R. vol. 79); 2 Den. C. C. R. 388, note (*a*).

posed evil which was to be met. There is no consideration here besides the mutual restraint: and that distinguishes this from all the cases where there has been an independent consideration; and the same distinction shows that analogies drawn from contracts of partnership are inapplicable. If this agreement be lawful on the part of the masters, a similar counter agreement would be lawful on the part of the workmen. The record does not show that the workmen have combined in this way. What the "other injuries" are does not appear: and the assertion that money has been arbitrarily levied and extorted is too vague. The plea of son assault demesne relies upon the right of self-defence. [ALDERSON, B.—It sets up an excuse for an act; that is all.] Assuming, however, that an exactly similar combination existed among the workmen; it would be much better that it should not be enforced on either side than that it should be enforced on both sides. Such contracts are entered into in moments of irritation and passion; and it is very important that parties should not be bound by them. Are they to be enforced in equity, by a decree for specific performance? [PARKE, B.—Courts *of equity have a discretion which we have not.] The discretion would be exercised only on the supposition that the contract was contrary to general policy: that supposition is enough to support the argument for the defendant. The object of stat. 6 G. 4, c. 129, was to set trade and work free; and it is with that view entirely that the restrictive statutes are repealed; though it is remarkable that sect. 2 assumes 2 stat. 33 Ed. 1 to contain enactments respecting trade or workmen, which is not the fact. But the provisions of stat. 6 G. 4, c. 129, go no further than to exempt the combinations there mentioned from punishment. Nor is there any reference to agreements to submit to the direction of a majority. The doctrine laid down in Mitchel *v.* Reynolds, 1 P. Wms. 181, and other cases, that a restraint of trade may be upheld where there is a good consideration for it, is entirely inapplicable to a case where the restraint is itself the consideration. That a contract may be void, as being in restraint of trade, because, though properly limited as to time, it is not limited as to space, appears from Ward *v.* Byrne, 5 M. & W. 548.† The Judges must determine whether the contract is, from its nature, contrary to public policy, as in Egerton *v.* Earl Brownlow, 4 H. L. Ca. 1. [PARKE, B.—Suppose parties entered into a bond not to cultivate their land otherwise than might be agreed upon at a meeting of the obligors; or not to marry without leave of the majority.] Such bonds could not be enforced. [PARKE, B.—Covenants against marriage are discussed in Low *v.* Peers, Wilmot's Notes, 364.(*a*)

*72]

*73] *Cowling*, in reply.—Since Hitchcock *v.* Coker, 6 A. & E. 438 (E. C. L. R. vol. 33), the notion, that the contract is to be upheld or not according as the Court thinks the consideration adequate or not,

(*a*) In Exch. Ch., affirming the judgment of K. B. in Lowe *v.* Peers, 4 Burr. 2225.

has been exploded. Cases are collected in note (*a*) to Hunlocke *v.* Blacklowe, 2 Wms. Saund. 156 a. The record fully shows a combination of workmen for opposing which this contract was entered into. The evils suggested in the argument on the other side arise, not from such contracts as this, but from the combinations which it is intended to obviate. *Cur. adv. vult.*

ALDERSON, B., now delivered the judgment of the Court.

This was an action by which the plaintiff sought to enforce a bond against the defendant. The condition of the bond recited that the defendant and seventeen other obligors, being respectively owners and occupiers of mills and other premises in Wigan and the neighbourhood, carried on their business of spinners and weavers of cotton yarn and cloth, and employed many workpeople and servants; and that certain societies or combinations subsisted in the neighbourhood amongst divers persons, whereby persons willing to be employed were deterred by a reasonable fear of social persecution and other injuries from hiring themselves to work at the said establishments; and that thereby the legal control of the obligors over their property and establishments was injuriously interfered with; and that these combinations were sustained by funds arbitrarily levied and extracted from the workmen employed by the obligors and receiving wages from them; and that it was *necessary to take measures for vindicating their legal rights to the control and management of their own property, which would best sustain the rights of the labourer to the free disposal of his skill and industry: and that, to effect this, the obligors had agreed to carry on their works in regard to the amount of wages to the labourer to be employed therein, and the times and periods of the engagements of workpeople, and the hours of work, and the suspending of work, and the general discipline of their works and establishments (in conformity to law) for the period of twelve months from the date of the bond, in conformity with the resolutions of a majority of the said obligors present at any meeting to be convened as therein mentioned; and that, for that purpose, they had entered into the bond; and the condition of the bond was therein stated to be that, if the several obligors and their partners should so carry on their works for twelve months in conformity with the resolutions of such majority, the bond as to 500*l.*, in which each was to be bound, should be void; otherwise to be in full effect. The plea concluded with an averment that, save as aforesaid, there was no consideration for execution of the bond by defendant; and that the bond was in restriction of trade, and illegal and void. [*74

To this plea there was a demurrer. And, on its being argued before the Judges of the Court of Queen's Bench, the majority of that Court gave judgment in favour of the plea. We are of opinion that the judgment was right, and ought to be affirmed.

The question is, whether this is a bond in restraint of trade: and we

think it is so. Primâ facie, it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of
*75] *carrying it on according to his own discretion and choice. If the law has in any matter regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion. Now here the obligors to this bond have clearly put themselves into a situation of restraint.

First: each of them is prevented from paying any amount of wages except such as the majority may fix, whatever may be the circumstances of the work to be done and his own opinion thereon. Secondly, they can only employ persons for such times and periods as the majority may fix on, however much the minority may deem it for their own interest to do otherwise. The hours of work, the suspending of work, partially or altogether, the discipline and management of their establishments, is to be regulated by others forming a majority, and taken from every individual member. And all this for a fixed period of twelve months. All these are surely regulations restraining each man's power of carrying on his trade according to his discretion, for his own best advantage, and therefore are restraints on trade not capable of being legally enforced.

We do not mean to say that they are illegal, in the sense of being criminal and punishable. The case does not require us; and we think we ought not to express any opinion on that point.

But then it is said that these regulations, otherwise illegal, are prevented from being so considered by the circumstances against which they were intended to operate. It appears that a counter combination existed on the part of certain workmen, and that the alleged object of this bond was to counteract this, and to set the willing and industrious workmen free from its powers. But, supposing this to be the object,
*76] and *that we may even consider it as laudable, we cannot agree that it is laudable or right to use such means of counteraction. The maxim *injuria non excusat injuriam* is a sound one, both in common sense and at common law. This is only to put one wrong as counterbalancing another wrong, to place the industrious workman in the fearful situation of being oppressed by a majority of masters in order to prevent him from being oppressed by a majority of his fellow workmen. And, besides, here it is to be observed that the masters' combination is not limited to the duration of the suggested combination of the workmen. It is to last for twelve months absolutely: so that, if the combinations assigned as the excuse for it broke up, as they almost always do, in a short period, this restraint upon the obligors would still continue in force after the object against which it seems to have been directed had long ceased to exist.

This bond, therefore, if not altogether illegal and punishable, is framed to enforce at all events a contract by which the obligors agree

to carry on their trade, not freely as they ought to do, but in conformity to the will of others; and this, not being for a good consideration, is contrary to the public policy.

We see no way of avoiding the conclusion that, if a bond of this sort between masters is capable of being enforced at law, an agreement to the same effect amongst workmen must be equally legal and enforceable: and so we shall be giving a legal effect to combinations of workmen for the purpose of raising wages, and make their strikes capable of being enforced at law. We think that the Legislature have been contented to make such strikes not punishable: and certainly they never contemplated them as being the subject of enforcement by a suit at law, on the part of the body of delegates, *against any workmen who might have been seduced by some designing person to [*77 sign an engagement with penalty to continue in the strike as long as a majority were for holding out.

We think, for these reasons, that the judgment of the Court of Queen's Bench is right and ought to be affirmed. Judgment affirmed.

A conspiracy of journeymen of any trade to raise their wages, by combining to compel others to conform to rules established by the conspirators, for the purpose of regulating the prices of labour, and carrying such rules into effect by overt acts, is an indictable offence: People *v.* Fisher, 14 Wendell, 9; Commonwealth *v.* Carlisle, 1 Journal of Jurisprudence, 225. Contra, The Commonwealth *v.* Hurst, 4 Metcalfe, 111.

RICHARD PARKER *v.* The GREAT WESTERN Railway Company. *Feb.* 23.

By special Acts a railway Company was entitled to charge for goods carried on their line at rates not exceeding certain rates per ton. They were permitted to charge a higher rate for small parcels not exceeding 500 lbs. weight, provided that "articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages. Plaintiff, a carrier, sent to the Company at once many packages, all consigned to one consignee, each less than 500 lbs., of articles of similar classes, but not being separate packages of one article. The Company charged for them as separate parcels.

Held, that they were justified in so doing; the proviso applying only to articles that were of such a nature that a large quantity was generally made up in separate packages.

The plaintiff also sent a parcel of coffee less than 500 lbs. weight; and afterwards, on the same day, another parcel of coffee, both consigned to himself, and for the same train. When the first was left, notice was given that plaintiff probably would send more; but it was not received on any special terms. The Company charged for these as separate parcels.

Held, that they were justified in doing so.

The Company were entitled to charge a certain rate "for all cotton and other wools, drugs, and manufactured goods." Held that this meant, not all goods on which human skill was employed, but those articles made in what are in popular language called manufactories.

The Company agreed with agents to collect and deliver goods for them, charging the public a small charge for doing so in addition to the charge for conveyance on the railway; to those agents the Company allowed in addition a sum out of the receipts of the Company. The

plaintiff, who collected and delivered his own parcels but was charged as highly as the rest of the public, complained that in effect this arrangement caused his goods to be charged higher than those sent through the agents, and that the difference was an overcharge. By their Act the Company were to charge all persons equally for conveyance, but there was a proviso that they might make agreements as to the collection and delivery of merchandise; and there was an appeal given by the Act to the Sessions by any one prejudiced against any arrangement giving special facilities to others.

Held that, under these enactments, the agreement with the agents, against which there had been no appeal, did not render the charges to the plaintiff overcharges.

THE following case was stated without pleadings, under the Common Law Procedure Act, in *pursuance of an order of Coleridge, J. The action was commenced on the 12th day of November, A. D. 1852.

*78]

The plaintiff is a common carrier, having his principal place of business at Skinner Street, London. For many years he has been in the habit of carrying goods for hire, employing for that purpose the defendants, The Great Western Railway Company, as common carriers to convey the goods on the Great Western Railway so far as was convenient to him, and performing the parts of the journey to and from the Company's stations by his own agents. After the 30th June, A. D. 1852, divers goods were delivered by the plaintiff to the Company at stations on their railway to be carried by them by the goods train. The goods were carried accordingly, and were received by the plaintiff from the Company also at one of their stations, and were his own goods, or goods which he was employed by his customers to carry as a common carrier. The plaintiff paid the Company their charges for carrying the said goods on the said railway under protest; and the plaintiff has, as he alleges, been overcharged by the Company in respect of such goods: and the action is brought to recover back the amount of such overcharges. During the said period the Company have carried goods for other carriers, besides the plaintiff, and also have carried goods sent to them for carriage by persons not carriers by trade. The Company have always found and provided the locomotive power, carriages, and trucks, and have always found and conducted the carriages, trucks, and engines used on the railway for the carriage of passengers and goods, and loaded and unloaded the goods, with the assistance of plaintiff's men, from the trucks, and covered the goods on the trucks: *this assistance was not required by the Company. The persons who act as common carriers have for many years found it necessary for their business to employ the Company to carry for them on their railways.

*79]

By stat. 5 & 6 W. 4, c. cvii.,(*a*) the subscribers were united into a Company for making such railway and for other purposes therein mentioned, and were incorporated by the name and style of the Great

(*a*) Local and personal, public: "For making a railway from Bristol to join The London and Birmingham Railway near London, to be called 'The Great Western Railway,' with branches therefrom to the towns of Bradford and Trowbridge in the county of Wilts."

Western Railway Company. The Act contained clauses (sections 163 to 169) allowing the free use of the railways to all persons on paying certain tolls specified in the said Act, empowering the Company to provide engines for propelling carriages upon the railways, and to receive for the use of the said engines such sums as the Company should think proper in addition to the said tolls, and also empowering the said Company to act as carriers of passengers and goods, supplying the locomotive power, engine, and carriages, and to make reasonable charges for so doing, but as to passengers restricted to $3\frac{1}{2}d.$ per mile per passenger. By section 163 all persons are allowed to use the railway on conditions. Section 171: "That it shall be lawful for the said Company from time to time to make such orders for fixing and by such orders to fix the sum to be charged by the said Company in respect of small parcels (not exceeding 500lbs. weight each) as to them shall seem proper: provided always, that the provision hereinbefore contained shall not extend to articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and *the like, but only to single parcels unconnected with [*80 parcels of a like nature which may be sent upon the railway at the same time." By sect. 172 and 173 certain provisions are made for regulating the charge for short distances, and for fractional parts of a ton or mile; and by sect. 174 the Company were empowered to reduce the rate and tolls by the Act authorized, and afterwards from time to time to raise them, so that they should not exceed the amount by the Act authorized. By sect. 175 provision is made for the equal charging of the said rates and tolls, which provision is repealed by stat. 7 & 8 Vict. c. iii.,(*a*) s. 48, hereinafter mentioned, and new provisions made instead thereof. By subsequent Acts the Company were authorized to alter and extend the line of their railway. By stat. 2 & 3 Vict. c. xxvii.,(*b*) after reciting the above-mentioned Acts of Parliament, certain provisions were by the 24th sect. made for the equal charging of persons using the said railway: this section is also repealed by stat. 7 & 8 Vict. c. s. iii., 48, and new provisions made instead thereof, as hereinafter mentioned. Under the provisions and powers contained in the said and subsequent Acts of Parliament, The Great Western Railway was completed, and has been carried on by the said Company, from time to time, down to the present time, in respect of the carriage of passengers and goods carried on and over the said railway and the various stages and parts thereof. Stat. 7 & 8 Vict. c. iii. s. 48,

(a) Local and personal public: "To amend the several Acts relating to the Great Western, the Cheltenham and Great Western Union, and Oxford Railways; to amalgamate the two last-mentioned railways with the Great Western Railway; and to authorize the formation of additional works at Cheltenham by the Great Western Railway Company."

(b) Local and personal, public: "To amend the Acts relating to The Great Western Railway; and to raise a further sum of money for the purposes of the said undertaking."

*81] *repealed stat. 5 & 6 W. 4, c. cvii., s. 175. Sect. 49: "That all tolls for the use of the said Great Western Railway (comprising the said Cheltenham and Great Western Union Railway and the said Oxford Railway, and any other railway belonging or under lease to the said Great Western Railway Company) shall be at all times charged equally to all persons, and after the same rate, whether per mile or per ton per mile, or otherwise, in respect of all passengers, and all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine, passing along the same portion of and over the same distance along the said railways or either of them; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person." Sect. 50: "That it shall be lawful for the said Great Western Railway Company, whenever they shall act as carriers, or shall provide locomotive or steam power or carriages for the conveyance of passengers, animals, goods, wares, merchandise, articles, matters, or things, to charge for such locomotive or steam power and carriages such sum (not exceeding the sums (if any) limited by the said recited acts or any of them), and that either per ton or per mile, or by bulk, measure, number, or admeasurement, or by fixed charges, as they shall think expedient: Provided always, that in whatever way the said charges are made they shall be made equally to all passengers and to all persons in respect of all animals, and of all goods, wares, merchandise, articles, matters, and things of a like description and quantity, and conveyed in or propelled by a like carriage or engine, passing only over the same

*82] portion of and over the same *distance along the said railways or either of them, and under the like circumstances; and no reduction or advance in any of such charges shall be made partially, either directly or indirectly, in favour of or against any particular company or person." Sect. 51: "That in all cases where the said Great Western Railway Company are intrusted with the carriage or delivery of any goods, wares, merchandise, or parcels, or other matters or things, it shall be lawful for the said Company to enter into such arrangements as they may think fit with all or any of the persons to whom such goods, wares, merchandise, parcels, matters, or things may belong, or by whom the same may be brought or sent for conveyance on the said railway, with reference to the warehousing, assortment, weighing, loading, or unloading, risk of stowage, and liability to alleged pilferage or damage, or with reference to the collection and delivery of such goods, or with reference to any other special facilities or accommodations afforded to or by the said parties in reference to such goods, wares, merchandise, parcels, matters, or things, and upon such terms and conditions as the Company and such parties respectively may be willing to accept and abide by; and it shall also be lawful for the said Company to enter into and make such arrangements as they may see

fit with any company or person with regard to the collection or delivery of such goods, wares, merchandise, parcels, matters, and things, and upon such terms and conditions as the Company and the parties to such arrangements respectively may be willing to accept and abide by: provided always, that if it shall be considered by any such person making use of the said railway that the said Company have to his prejudice *accorded any special facilities to any other such persons which [*83 they are unwilling to accord to him, then and in such case it shall be lawful for the party so conceiving himself to be so aggrieved to appeal to the Court of Quarter Sessions of the county or one of the counties in which such facilities are accorded; and the said Court shall have power and are hereby required, on such application (of which fourteen days' notice shall be given to the Company), to appoint a barrister of not less than seven years' standing, or some other competent person not interested in or connected with the railway or the party with whom any such dispute shall arise, to inquire into the matter in difference, and the person so to be appointed shall have power to call before him and to examine all persons whose evidence may be considered necessary to the inquiry, and to require the production of all books, papers, and writings which he may deem requisite or which ought to be produced for the elucidation of the matter referred to him; and on the report of such person it shall be lawful for the said Court to order and require the said Company to admit the party making such appeal to the enjoyment of the same facilities which may at the time be granted by the Company to other such persons under the like circumstances, unless it shall be proved to the satisfaction of the person making such inquiry that any wilful fraud or contravention of agreement with the Company has been committed by the party making such appeal, and the said Company shall in all things conform to and abide by the order which may be so made by the said Court upon due consideration of the circumstances under which and the extent to which such fraud or contravention may have been carried *on by such party." Stat. 10 & [*84 11 Vict. c. cxlix.,(a) contains enactments regulating the tolls and charges which might be taken by The Great Western Railway Company. Sect. 13 prescribes the tolls which The Great Western Railway Company might demand for the use of the Great Western Railway, or of the Birmingham, Wolverhampton and Dudley Railway, in respect of passengers, cattle, and goods. Sect. 14 prescribes the tolls which The Great Western Railway Company might demand for the use of engines for propelling the carriages of other parties on the said railways. Sect. 15 enacted that the maximum rates of charge to be made by The Great

(a) Local and personal, public: "For enabling The Birmingham, Wolverhampton, and Dudley Railway Company to purchase lands for additional station room at Birmingham, and for authorising the sale of the undertaking of the said Company to The Great Western Railway Company."

Western Railway Company for the conveyance of passengers, cattle, goods, &c., along the said railways, as aforesaid, including the tolls for the use of the said railways, and wagons, and trucks, and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering and unloading of goods, and for delivery, and for collection, and any other service incidental to the business or duty of a carrier, when such services or any of them were or was performed by the said Company, which should not exceed the sums therein specified and set forth. The 16th, 17th, 22d, and 23d sects. contain provisions as to the tolls and charges. By subsequent statutes the purchase of The Birmingham and Oxford Junction Railway and The Birmingham, Wolverhampton and Dudley Railway by The
*85] Great Western Railway Company was authorized; *but no transfer was to be made to The Great Western Railway Company until their tolls and charges were reduced as therein provided. These reduced tolls and charges were afterwards fixed by stat. 10 & 11 Vict. c. ccxxvi.:(*a*) and it is admitted that they came into operation on and after November 1st, A. D. 1852, but not before. Sect. 47 of this Act sets forth the tolls which The Great Western Railway Company might demand and receive in respect of the use of the Great Western Railway, and the branch railways by the Act authorized to be made, by parties using the same either with their own carriages and engines employed by them thereon, or with their own engines only (in cases where The Great Western Railway Company as thereinafter provided might consent to supply carriages).(*b*) Sect. 48 enacts that the toll which The Great Western Railway Company might demand for the use of engines for propelling the carriages of other parties on the said railways should not exceed one penny per mile for each passenger or animal, or for each ton of goods or other articles, in addition to the several other tolls or sums by that Act authorized to be taken for the use of the said railways. Sect. 49 sets forth the maximum rates of charge to be made by the Company for the conveyance of goods along the said railways, including the tolls for the use of the said railways and wagons or trucks and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading of goods,
*86] *and for delivery, and collection, and any other services incidental to the business or duty of a carrier where such services are performed by the Company.(*c*) Sect. 50 regulates the amount of charge where the distance exceeds fifteen and fifty miles. Sect. 51

(*a*) Local and personal, public: "For making branch railways from the Great Western Railway to Henby and to Radstock; to widen certain portions of the Great Western Railway; to enable The Great Western Railway Company to purchase or amalgamate with the Birmingham, Wolverhampton, and Dudley Railway, and to purchase the Wycombe and Great Western and Uxbridge Railways; and for other purposes."

(*b*) The rate for "manufactured goods" is specified: see post, p. 107.

(*c*) See post, p. 107.

sets out the tolls and charges authorized by the Act; and sect. 53 sets out the tolls and charges for small packages and single articles of great weight.(*a*)

The mode of charging for goods carried on the Great Western Railway by goods train, adopted by The Great Western Railway Company, and which has been in force on and since the 30th June, 1852, is the following. It is in this case afterwards called the system of charging. The Company daily send trains for the conveyance of goods exclusively; they are commonly called "luggage trains" or "goods trains;" for convenience they are hereinafter called "goods trains." For the purpose of more conveniently making the charges for carrying the goods on the railway by goods trains, all goods are divided into classes. From the 30th June to the 1st November, 1852, there were 5 classes, one marked S and the others marked 1, 2, 3, and 4; and on and after the 1st November, 1852, there were 6 classes, one marked M and the others marked 1, 2, 3, 4, and 5. The class in which goods are to be charged is shown by a printed alphabetical list or classification of goods, in which the class to which goods respectively belong and are to be charged is shown, by the letter S, denoting special class, and by the letter M, denoting mineral class, or by the figures 1, 2, 3, 4, or 5 set after and opposite to the name of such goods in the list, all goods not enumerated in the list being, as *mentioned at the foot of the list, to be charged as mentioned in the lists. The lists for the [*87 period from the 30th June to the 1st November, 1852, accompanies this case;(*b*) and the one for the period on and after the 1st November also accompanies this case.(*b*) These charges are for conveyance along the Great Western Railway and every expense incidental to such conveyance, including a sum for loading, covering, and unloading, and for every other service incidental to the business or duty of a carrier; but they are exclusive of any charge for collection, delivery, or carting to or from the railway station. They have from time to time been varied in amount; and the clerk at each station on the railway has, from time to time, been furnished with a scale showing the charge for goods in each class to be made per ton, and so in proportion, for carrying goods on the railway from his station to the several other stations on the railway; such charge being the same for all goods charged in the same class; but the charge to the several stations varying as they are more or less remote from the station from which the goods are despatched. For convenience these charges are hereinafter called the "tonnage rates;" copies

(*a*) See post, pp. 102, 108.

(*b*) It is not necessary to give copies of these lists, which comprised almost all articles arranged in alphabetical order, and placed in classes without apparently requiring that they should be of the same nature. For example, "agricultural implements," "ale in bottles," "arrowroot," "baskets," "beds," "feathers," being all in class 4; "ashes," "balls," "cannon," "barley," "bricks," "brimstone," being all in class S; whilst "iron wire" was in class 1, and "iron wire bright" in class 2; and many similar instances.

of the scale for the Paddington station for the period from the 30th of June to the 1st November, 1852,(*a*) and of, on, and after the 1st Novem-
*88] ber, 1852,(*a*) accompanying the case. The clerk at each station *is also furnished with a scale by which to ascertain the charges to be made on packages or parcels sent by goods train not exceeding 500 lbs. in weight. For convenience these charges are hereinafter called the "parcel rates." These parcel rates are greater in amount than the tonnage rates; copies of this scale accompanying this case.(*a*) Save the aforesaid scales and lists there is no other document used in fixing the charge for carriage of goods on the said railway by goods train. In fixing the charges to be made for the carriage of goods as aforesaid The Great Western Railway Company have regarded the bulk and nature of the goods and the trouble and risk attending their carriage. On the 30th June, 1852, and ever since, the charges made by The Great Western Railway Company for goods sent on the said railway by goods train have been made according to the said system of charging. The plaintiff claims, on and after the 1st November, 1852, to be charged at the rates allowed by stat. 10 & 11 Vict. c. ccxxvi., when such rates are lower than the Company's scale bill, and by the scale bill when such rates are lower than the said Act.

First objection and claim of the plaintiff. The plaintiff claims to be charged after the 1st November, 1852, at the aggregate weight of each class, according to the Company's classification table or tables, at parcel rate by scale bills when the weight does not exceed 500 lbs., but when above 500 lbs. at tonnage rates of stat. 10 & 11 Vict. c. ccxxvi., or scale bills, as the plaintiff may select. After the 1st November in that year the plaintiff sent to a station of the Company, to be carried at the same time by the same train on the said Great Western Railway to
*89] *another station of the Company, several parcels of goods. On one of these occasions each parcel of goods, by itself, weighed less than 500 lbs., each parcel containing goods of the same class, say drugs, drapery, glass, and stationery, which are in Class 4, according to the classification of goods hereinbefore referred to; but, for the purpose of the present question only, it is to be taken that each of such parcels was a separate package. In such case the Company have charged for each parcel separately, according to the aforesaid parcel rate. The plaintiff has paid such charge under protest, but claiming to have the several parcels treated as one parcel, and to be charged for their aggregate weight according to the said parcel rates.

Question 1. The question is, Whether, under the circumstances, the Company were entitled by stat. 10 & 11 Vict. c. ccxxvi., taken in connexion with their scale bill, to charge each parcel separately, or were bound to charge them at their aggregate weight.

(*a*) It is not necessary to print the scales, which are very long; the effect is sufficiently given in the body of the case.

On another of the aforesaid occasions each parcel of goods in itself weighed less than 500 lbs., but the aggregate weight of all the parcels was more than 500 lbs.; each parcel containing goods of the same class, say drugs, drapery, glass, and stationery, which are in the 4th Class according to the classification of goods in the said list. For the purpose of this question only, it is to be taken that each of such parcels was a separate package. In such case the Company have charged for each parcel separately, according to the said parcel rates. The plaintiff has paid such charge, under protest, but claiming to have the several parcels treated as one parcel, and to be charged for their aggregate weight according to the tonnage rates allowed by stat. 10 & 11 Vict. c. ccxxvi.

*Question 2. The question is, Whether, under these circumstances, the Company were entitled by stat. 10 & 11 Vict. c. ccxxvi., taken in connexion with their scale bill, to charge each parcel separately according to the said parcel rate, or were bound to charge them according to their aggregate weight at the tonnage rates. [*90

Second objection and claim of the plaintiff. Before the 1st November, 1852, the plaintiff claims to be charged by class and scale bill, and the Acts of 5 & 6 W. 4, c. cvii., and 7 & 8 Vict. c. iii., at the aggregate weight by parcel rate or tonnage rate, as such weights may be under or over 500 lbs. For the purpose of this objection only, all the facts stated for the purpose of the first objection are to be treated as here inserted, the dates being varied to times between the 1st July and the 31st October, 1852, both inclusive.

Question 3. The question is, Whether the Company, under these circumstances, were entitled, under stats. 5 & 6 W. 4, c. cvii., and 7 & Vict. c. iii., taken in connexion with their scale bill, to charge each parcel separately according to the said parcel rates, or were bound to charge at the aggregate weight according to the said parcel rates when such aggregate weight was under 500 lbs., and according to the said tonnage rates when such aggregate weight was over 500 lbs.

Third objection and claim of the plaintiff. If the plaintiff fails to establish the charge by the aggregate of the class, then he claims to be charged by the aggregate of the kind, by stat. 5 & 6 W. 4, c. cvii., and scale bill, or one of them, prior to 1st November, 1852, and by stat. 10 & 11 Vict. c. ccxxvi. and scale bill, or one of them after that day. The plaintiff sent on the same day to Paddington station at different times of the day, *say at 2, 4, and 6 o'clock, P. M., a load of goods. In each load was a package of coffee weighing less than 500 lbs. By the plaintiff's direction, these loads of goods, including the coffee, were sent by the same train, being the first that started thereafter to another station of the Company. The Company have charged each parcel of coffee as a separate parcel. The plaintiff was consignor and consignee of all the parcels of coffee. A ticking off note was required by the [*91

Company to be delivered by the plaintiff, with each of the said loads of goods; but the weight on the first ticking off note was carried to the second, and the second to the third, and so on till the last, upon which the total weight appeared.(a) This carrying forward was done by the plaintiff or his servants, without the same being requested by the Company (who placed in trucks each load of goods without waiting the arrival of further goods), and as soon as conveniently could be after such load of goods and ticking off notes came to them, that being necessary for the due conduct of their business as carriers. Copies of the ticking off notes accompanied the case. By these it appeared that the Company had struck out the carrying forward and altered the classifications.

Question 4. The question for the opinion of the Court is, Whether, under the circumstances above mentioned, the Company were bound to charge for the said coffee in the aggregate or were entitled to charge for each package separately.

Fourth objection and claim of the plaintiff. The plaintiff claims to classify his goods in accordance with the Company's scale bills and their Acts of Parliament. The plaintiff, on two distinct days subsequent to
*92] the 1st *November, 1852, sent at the same time to a station of the defendants, to be carried on the Great Western Railway by the same train to another station of the Company, several packages of goods of which the plaintiff was the consignor and consignee. On the first of the said occasions the plaintiff sent to the Company with the goods a ticking off note, of which the following, as it appears in thin-faced type, is a copy:—

Name or Mark.	No.	Description of Package.	Contents.	Weight.			Railway Charge.
				cwt.	qrs.	lbs.	
Simonds . . .	1	Box	Luggage		1		
			Glass	0	1	0	4d.
Langford . . .	1	Do.	Do.		1		
			Stationery	0	1		4d.
Ryott	1	Hamper	Do.	1			
			Shoes	1			9d.
Panham . . .	1	Do.	Do.	6			
			Drapery	6			6d.
Wheeler . . .	1	Basket	Do.				
			Ironmongery			14	4d.
				7	2	14	

The Company added the weight and railway charges as they appear in full-faced type. For the purposes of this case the ticking off note is admitted to be correct. The Company have charged the drapery as a separate package at tonnage rate, and each of the other packages sepa-

(a) The words "carried forward" were written, under the head of 'Remarks," upon all the ticking notes except the last.

rately at parcel rates. It is admitted for the purpose of this case that all the above goods are manufactured goods. The plaintiff contends that all the said goods, or some of them, are manufactured goods within stat. 10 & 11 Vict. c. ccxxvi., ss. 47, 49, and 53, and that such of them as are such manufactured goods should have been charged in the aggregate. The Company deny this. On the second of the said occasions the plaintiff sent to the Company with the goods a ticking off note. A copy was set out, which was exactly like *the former, and which [*93 showed that the Company wrote over the words Luggage the correct description of the respective packages, inserted the weights of each separately, and charges for each separately, as in the former instance. The Company have charged each package separately at parcel rates. The plaintiff contends, as before, that all the articles, or some of them, are manufactured goods within the said sections, and that such of them as are manufactured goods should have been charged in the aggregate.

Question 5. The question therefore for the opinion of the Court is, Whether the Company were entitled by stat. 10 & 11 Vict. c. ccxxvi. taken separately, or taken in connexion with their scale bills, to charge for each of the said packages separately as aforesaid, or were bound to charge all or some of them in the aggregate as contended for by the plaintiff.

Fifth objection and claim of the plaintiff. On and after the 1st November, 1852, the plaintiff claims to have "manufactured goods" classed together, and to be charged at a rate not exceeding $2\frac{1}{2}d.$ per ton per mile, when carried a distance exceeding fifty miles, and at a rate not exceeding $3d.$ per ton per mile when carried a distance not exceeding fifty miles. The first branch of the question depends on the meaning of the words "manufactured goods" in the scale of charges set out in section 47 of stat. 10 & 11 Vict. c. ccxxvi., and, by reference, in the 49th section of that Act. The following instances will show some of the goods which the plaintiff alleges to fall within the denominations of manufactured goods in the said section. "Tinware," "drapery," "paper," "hardware," "cutlery," "tea," "butter," "glass," "leather." The defendants have not treated *any of [*94 these as manufactured goods, but have charged for them, each package separately, according to the class in which they are mentioned in the accompanying classification list.

Question 6. The question is, Whether all or any of the above goods fall within the term manufactured goods in stat. 10 & 11 Vict. c. ccxxvi.

Second branch of the fifth objection and claim of the plaintiff. On and after November 1st, 1852, the plaintiff claims to have manufactured goods, in a package exceeding 500 lbs., carried at a rate not exceeding $2\frac{1}{2}d.$ per ton per mile, when carried a distance exceeding fifty miles, and at a rate not exceeding $3d.$ per ton per mile when carried a distance not exceeding fifty miles. The Company contend that they

are entitled to charge beyond those sums a reasonable sum for loading, covering, and unloading the goods when performed by them. The plaintiff did, after November 1st, 1852, deliver to the defendants a package of manufactured goods, exceeding 500 lbs., which was conveyed by them for the plaintiff along the said railway a distance exceeding fifty miles, and another package of manufactured goods, exceeding 500 lbs., which was by the defendants conveyed for the said plaintiff along the said railway, a distance not exceeding fifty miles; and the defendants charged, and the plaintiff paid, in the former case a sum exceeding 2½*d.* per ton per mile, and in the latter case a sum exceeding 3*d.* per ton per mile. These sums were charged, not only for the conveyance along the railway, but also for the loading, covering, and unloading the said goods performed by the Company.

*95] Question 7. The question is, Whether, under the *circumstances aforesaid, the Company are entitled to charge any sum exceeding 2½*d.* or 3*d.* per ton per mile as the case may be for such goods respectively so loaded, covered, and carried along the said railway, and unloaded by the Company. The plaintiff contends that, supposing the defendants are entitled to make any such charge, the sum so charged beyond the 2½*d.* and 3*d.* was unreasonable, and paid the same under protest.

Sixth objection and claim of the plaintiff. The plaintiff claims on the grounds of inequality 2*s.* 4*d.* per ton; a reduction of rate, to this amount or more per ton, being made on all goods carted to or from Paddington by Henry Harms, John Bloomfield & Son, W. Wright, and F. Seaward, and upon other goods. In addition to carrying from station to station on their railway, for which they charge according to the said system of charging, the Company, in the beginning of the year 1852, made agreements with the said Henry Harms, John Bloomfield & Son, W. Wright, and F. Seaward, hereinafter called agents, whereby the said agents, among other services mentioned in the said agreements, bound themselves to collect goods within certain limits and cart them to the Paddington station to be forwarded from that station by The Great Western Railway Company to some other station on the said railway. Also, within the same limits, to deliver to the consignees thereof, when required, goods which had by the said Company been carried on the said railway and brought to their said Paddington station. The following is a copy of the agreement with the said Henry Harms:

"Arrangement agreed with Mr. Harms for agency and cartage of *96] goods, subject to the general conditions and *understanding explained in the two agreements, which were read to him. General charge for cartage of all goods of whatever class or description, and including all smalls, up or down, to be paid at the rate of 3*s.* 4*d.* per ton. In addition thereto a payment to be made in respect of agency

for all goods conveyed, at the rate of 1*s.* 6*d.* per ton as commission for agency. With respect to all up goods, for delivery a sum of 2*d.* to be allowed for each lot of parcels under 2 cwt. to be delivered at one place, or for each separate parcel, where there is only one parcel, to be delivered at one place. Mr. Harms is to charge and receive the usual booking fee for down parcels or goods from the public, but not to make it a charge upon the goods themselves. In like manner also to receive for pitching flats of butter 2*d.* each, flats of poultry or meat 3*d.* each, and for each hamper or pack of meat 6*d.* not exceeding 4 cwt., and 1*s.* for each hamper or package exceeding 4 cwt.: where the custom of trade allows pitching charges, such charges to be received by Mr. Harms from the party to whom the hampers and packages are deliverable. Empty meat and poultry or provision hampers to be collected and taken to the station free of charge, and empty returned packages to be taken to the station free. Empties up and delivered by Mr. Harms to be charged for at the usual rate charged by others. The Company to allot to Mr. Harms upon an average $\frac{1}{8}$th of their up loading of various kinds to be delivered. They engage to pay to him the commission of 1*s.* 6*d.* per ton on 4000 tons of up loading as a minimum quantity for a year. The cartage to be paid upon the actual quantity brought to or taken from the station. The cartage rate is to include every expense incidental to the moving the goods, and *the safe and proper custody of them while moving. The commission and the extra 2*d.* is to [*97 include and cover every expense of managing, receiving, delivering, assorting, weighing, and entering all goods up and down, receiving money and accounting for it as agents specially employed for that purpose. Mr. Harms engages to receive goods for all places to which the Company carry goods, and to hand them over absolutely to the Company at the Paddington station, in the same state and with the same address, &c., as they are received, and not to direct or consign them to others. The agreement is not to comprehend mileage goods received by the Company either up or down, for which they may make when necessary separate agreements. In the event of any necessary condition being omitted here, it is to be settled upon a fair and equitable principle and included in the agreement which is to be drawn up. Terms of agreement to be for three years, with the right of Mr. Harms to give notice to the Company, on or before 31st December next, to terminate this agreement on the 20th March, 1852; but in default of such notice to be continued for a period of three years from the 31st. And with a power to either party to terminate it after June, 1852, upon three months' previous notice.

Copies of the two agreements referred to in the above agreement with the said Henry Harms accompany this case, and may be referred to as part thereof.(*a*) The agreements with the other agents are similar

(*a*) It is not necessary to notice them further.

to those with the said H. Harms. The said agents have continued to be employed and paid by the Company on the terms mentioned in the
*98] said agreements up to this time. *Previous to the making the said agreements some of the said agents had been common carriers between London and other parts of Great Britain, including the places to which the Company carry goods; the others had been and acted as agents in the collection and delivery, within the London District, of goods for other carriers upon the defendants' and other lines of railway, receiving from such carriers, for such collection and delivery and other services, similar to those for which the said agents since the said agreements receive the said 3*s.* 4*d.* and 1*s.* 6*d.* per ton, the sum of 5*s.* per ton. They were not common carriers, but were what are technically called carriers' agents. For the purpose of their said business, each of the said persons had receiving houses in London, and horses, carts, and servants. Since the said agreements the said agents have, as agreed with the Company, given up their respective trades to and from the places to and from which the Company carry goods; but they have continued their respective trades to other places; and they have used the same or similar houses, horses, carts, and servants as well for the purposes of their agreements with the Company as for the purposes of their respective trades to places other than those to which the Company carry goods. With respect to goods collected by the agents under the said agreements, each agent is required to weigh the goods and to deliver a separate ticking off note for certain districts, but not a separate one for each station; and he is allowed by the Company to deliver such goods to them one hour and a half each day later than the plaintiff, as a carrier, is allowed to deliver. But the plaintiff, as one of the public, is allowed to deliver as late as the rest of the public. The dis-
*99] tinction between the plaintiff as a carrier and as *one of the public, in this respect, is that, as a carrier, his goods are delivered to his own direction at the station independent of who are the parties to whom they are directed, and that, as one of the public, the goods would be delivered by the Company to the persons to whom they were directed. A different mode of dealing with carriers' goods and public goods is adopted: and it is alleged by the Company that this mode requires more time in the preparing of documents and otherwise for the despatch of carriers' goods than is ordinarily required for goods of the public. And, with respect to goods received from the Company to be delivered by the agents, the Company make out the ticket or account for the charges for carriage and delivery of each parcel, stating the charge for carriage on the railway separately from the charge for delivery. In the settling of the accounts between the Company and the agents, the charge for cartage, when received by the Company, is treated as belonging to the agent. For their services under the said agreements the said agents respectively receive from the Company the said commission of

1*s.* 6*d.* per ton on all goods brought by such agents respectively to the said station, to be carried by the Company on their said railway; and the Company also under the said agreements pay to the said agents respectively, in respect of all goods brought by the said railway to the said station, and by the said agents respectively carted from the said station, and within the limits aforesaid delivered to the consignees thereof, the said sum of 3*s.* 4*d.* per ton, and the said sum of 2*d.* for each lot of parcels under 2 cwt. to be delivered at one place, and the same sum for each separate parcel when only one parcel is to be delivered at one place. *The said rate of 3*s.* 4*d.* per ton is insufficient to pay for the collection or delivery; and the said [*100 agents would not be remunerated for the same by the receipt of that sum. The remuneration for that and the other services herein described is made up in the allowance of the 1*s.* 6*d.* and the other sums. There has been no appeal in respect of the arrangements or matters aforesaid, or any of them, under the said 7 & 8 Vict. c. iii. s. 51. As before stated, the plaintiff collects, carts, and delivers all goods sent by him on the said railway. He is also required by the Company and does deliver a separate ticking off note for each station of the Company; and he pays to the Company the charges for carriage on the said railway on each consignment, as from station to station, and at the time of making the said consignment. These charges, for the purpose of this question, are to be taken to have been paid by the plaintiff under protest. The question is, Whether, under the circumstances stated in relation to this claim, the plaintiff is entitled to recover.

If the Court should be of opinion that the plaintiff is entitled to recover, the mode of ascertaining the damages is provided for by a Judge's order.

The case was argued in last Michaelmas Term (*a*) by *Knowles* for the plaintiff, and *Bramwell* for the defendants.

In the course of the argument reference was made to Parker *v.* The Great Western Railway Company, 7 M. & G. 253 (E. C. L. R. vol. 49), Parker *v.* The Great Western Railway Company, 11 Com. B. 545 (E. C. L. R. vol. 73), Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399,† and *Attorney-General *v.* The Birmingham [*101 and Derby Junction Railway Company, 2 Railway Cases, 124. The nature of the case is such as to render a detailed report of the arguments unnecessary. *Cur. adv. vult.*

COLERIDGE, J., now delivered judgment.

This is a case stated for the opinion of the Court and raising a great many questions, upon each of which it is desired. These grow out of disputes between the parties, arising substantially from the charges which the defendants have made on the plaintiff for the carriage of goods.

(*a*) November 20th. Before Lord Campbell, C. J., Coleridge, Wightman, and Erle, Js. Erle, J., left the Court before the completion of the argument.

The circumstances under which each question arises are succinctly stated in the case, together with the several charges made by the defendants and paid by the plaintiff under protest; and the objections severally applicable thereto, with the correspondent claims for compensation which he sets up in consequence. We will take each in its order as stated, and express the opinion we have formed upon it.

After 1st November, 1852, the plaintiff sent to be carried by the defendants from one of their stations to another several parcels of goods; each parcel weighed less than 500 lbs.; and the aggregate weight of the whole was less than 500 lbs.: the contents of each parcel were of the same class in the defendants' classification paper; but each parcel is to be taken for the purpose of this question to have been a separate package; the defendants have charged for each parcel separately, according to what is called "the parcel rate." The question is, Whether they were entitled so to do, the plaintiff claiming to have the whole treated as one parcel, and to have it charged on the aggregate

*102] *tonnage weight. For the purpose of this case it may be stated that the defendants have and are entitled to have two rates of charging:—1st, That which the case calls "tonnage rates," as to which the amount of charge varies according to the tariff prescribed in their special acts. 2d, The "parcel rates" which are applicable under the special acts only to weights under 500 lbs.; with these last we have at present to do. The power of the defendants to charge for parcels after 1st November, 1852, depended on stat. 10 & 11 Vict. c. ccxxvi., s. 53, by which it is enacted that the defendants "for the carriage of small parcels (that is to say, parcels not exceeding 500 lbs. weight each)," "may demand any sum which they think fit: provided always, that articles sent in large aggregate quantities, although made up of several parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages." The question turns upon the construction of these words. It is clear that, to be a small parcel within their meaning, the weight must not exceed 500 lbs., it must be single, and it must be in a separate package: unless these conditions are complied with, the denomination of a small parcel is not to apply to it; it would seem to follow, therefore, that several parcels, each being a separate package, cannot constitute one small parcel within the Act; and if they form each a small parcel there is nothing in the Act which compels the defendants to charge for them as one according to their aggregate weight, though it falls short of 500 lbs. But the plaintiff relies on the preceding words in the proviso, which speak of "articles sent in large aggregate quantities, although made up of separate parcels;" the illus-

*103] tration which is added, *however, seems to us clearly to show to what these words apply, "such as bags of sugar, coffee, meal, and the like:" and the meaning is obvious. Where at one time an

article is sent in a large aggregate quantity, but the mode of packing it is in bags, boxes, or bales, which in some sense would seem to constitute separate parcels, as in the case of sugar, coffee, meal; this mode of packing will not take it out of the lower or tonnage rates and enable the Company to charge for each bag, box, or bale separately on the higher or parcel rate: and this is perfectly reasonable; for what is sent is one large entire quantity of great bulk; that which in itself is properly the subject of the tonnage rate; and where it is only the mode of packing, a matter indifferent to the Company, which would bring it apparently within the description of a number of small parcels. The case before us does not come within this reason. But the plaintiff further relies on the fact that the contents of each parcel were of the same class in the classification table before mentioned; and we assume in the plaintiff's favour that by this is meant that *all* the parcels were made up entirely of goods of the same class. This argument was made use of by the plaintiff in a case between the same parties in the Common Pleas;(*a*) and the answer was given, which is undoubtedly true, that the classification table has nothing to do with the question of parcel or no parcel; it is made for a wholly different purpose. We are, therefore, of opinion that the defendants were entitled to charge for each parcel separately.

The only distinction between this question and that next propounded is, that, whereas in the first the *aggregate weight of all the parcels was taken to be under 500 lbs. weight, in the latter it is to be taken to have exceeded it. But, as we have determined that each parcel is the subject of a separate charge, and each was under 500 lbs. weight in both cases, this difference in the aggregate weight of all is immaterial; and we, therefore, answer this question as we have the preceding. [*104

The third question supposes all the same facts as stated to raise the first, but that they occurred between the 1st July, 1852, and 31st October, 1852; and the materiality of this change depends on this, that the governing statutes during this period were stat. 5 & 6 W. 4, c. cvii., and stat. 7 & 8 Vict. c. iii., stat. 10 & 11 Vict. c. ccxxvi. not having come into operation until the 1st November, 1852. The material section to consider is the 171st of stat. 5 & 6 W. 4, c. cvii.; and that differs from the 53d sect. of stat. 10 & 11 Vict. c. ccxxvi. in the wording of that part which specifies the sort of parcel to which the "parcel rate" of charge shall apply. It enacts that the provision "shall not extend to articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only *to single parcels unconnected with parcels of a like nature, which may be sent upon the railway at the same time.*" The plaintiff contends that, when he sent at the same time seve-

(*a*) Parker *v.* The Great Western Railway Company, 11 Com. B. 545, 580 (E. C. L. R. vol. 73).

ral parcels altogether weighing less than 500 lbs., and each and every parcel made up of goods which fell within the same class in the defendants' classification paper, as, for example, drugs, drapery, glass, and stationery, no one of these was a single parcel "unconnected with parcels of a like nature;" for that "like nature" must, in a Carrier's Act, *105] obtained by carriers, and speaking the language of *carriers, be construed with reference to convenience and rate of carriage. But we think that this branch of the sentence is clearly used in opposition to that which immediately preceded it, and must be construed with reference to that. That branch excluded from the class of parcels large aggregate quantities of the same description of goods "although made up of separate and distinct parcels, such as bags sugar, coffee, meal, and the like." When, therefore, this is followed, in a specification of what is to be included, by the words, "single parcels unconnected with parcels of a like nature," we think connexion in quality or kind was intended, and that no reference is intended to a classification paper framed for a different purpose. We, therefore, answer this question as the two preceding.

Failing on this point, the plaintiff makes a claim connected with it of this sort. On a day within the periods last named he sent three loads of goods to the defendants' station at Paddington; in each load was a package of coffee; the plaintiff was the consignor and consignee of each package; each was to be forwarded to the same station; and each was directed to be, and was in fact, forwarded by the same train; each package of coffee weighed less than 500 lbs.; the three together weighed more: the plaintiff on each delivery at the station gave in, as was required, a "ticking off note" in which the weight was entered by him; and on each of the first and second deliveries this weight was on the ticking off note entered as "carried forward" under the head of "remarks." The defendants, however, who had, so far as appears, no other notice than what might be inferred from this memorandum that any other goods would be sent by the plaintiff for carriage before the *106] *starting of the train, placed each load of goods, as it arrived, in trucks, ready for the train; and it is found that this was necessary for the due conduct of their business as carriers. Upon these facts the fourth question is, Whether the defendants were bound to charge for the coffee in the aggregate, or might charge for each package of it as a separate parcel; and, after much consideration and doubt, we are of opinion that they were not so bound, but might charge for each package as a separate parcel. Certainly they would have been so bound, if the three packages of coffee had been delivered at the station at the same time. The case would then have fallen within the very words of the proviso: and it is said that the delivery with directions to forward all by the same train, coupled with the notice that the first parcel was to be followed by a second, and the second by a third, which

notice it is said is fairly to be inferred from the carrying forward from one ticking off note to the other, makes the delivery of the whole the same in effect as a delivery at one time, the whole being thus one consignment brought to the station in the course of one and the same delivery by successive instalments. It appears to us however that this is to give an undue effect to the entry by the plaintiff on the "ticking off notes;" the very circumstance of there being three such notes in itself leads to the inference of three separate deliveries on three separate contracts; and this is strengthened by every other fact in the case. The coffee on each occasion comes accompanied by several other parcels of goods, the aggregate of which the plaintiff obviously intended to form one package to be charged for at tonnage rates. The defendants pursued their usual, indeed, as is found, their necessary, course of business in *immediately packing those parcels on trucks: and, though [*107 the words "carried forward" might import that more goods were coming, it gave no information that more coffee in particular was coming, or that, if it came, it was to be consigned to the same station. Had the train been full, nothing would have obliged the defendants to forward the latter parcels with the first. We cannot therefore see any evidence of any contract in fact between the parties which compelled the carriage of all three parcels as one; and we answer this question in favour of the defendants.

The fifth question turns on the meaning to be given to the expression "manufactured goods," used in the 47th sect. of stat. 10 & 11 Vict. c. ccxxvi., and thence by reference introduced into the 49th: on two several days after the 1st November, 1852, the plaintiff sent at the same times respectively several packages of goods of which he was both consignor and consignee, to be forwarded by the same trains respectively to another station. On these occasions the articles were glass, stationery, shoes, drapery, ironmongery. The defendants in each case, where the packages were of less weight than 500 lbs., have charged them as parcels. The plaintiff contends that on each occasion the weight of the whole should have been taken, and the charge made on the aggregate at tonnage rates; for this he relies on the 49th sect. before referred to, which, in fixing the maximum rate of charges allowed to be taken by the defendants, uses the following words: "For all cotton and other wools, drugs, and manufactured goods,"(*a*) "conveyed any distance not exceeding 50 miles, the sum of 3 pence per ton per mile."(*b*) On both sides *the argument turned on the construction of these words: but it [*108 is to be observed that this part of the tariff applies only to tonnage rates, and that, whenever the defendants were entitled to charge parcel rates, as they appear to have been in all the instances given, except on each occasion a package of drapery of 600 lbs. weight, such right is not affected by this clause; for the 53d section, where it applies,

(*a*) Sect. 47. (*b*) Sect. 49.

applies "notwithstanding the rate of tolls prescribed by this Act." We will consider the question, however, as it was argued. The defendants contended correctly that some qualification must of necessity be put on the words "manufactured goods;" for in the unqualified sense of goods produced from a raw material by manual skill and labour several particulars are mentioned in preceding clauses, and subject to different rates of payment; and it cannot have been intended to include these in the clause now under consideration. The question then is, what qualification or limitation are we to put on the words. We get no assistance from the context; "cotton," "wools," and "drugs" may all mean articles in the raw state—probably do. In stat. 5 & 6 W. 4, c. cvii. s. 164, is the clause from which the present and the next immediately following are taken; and it stands thus: "For all cotton and other wools, hides, drugs, manufactured goods, and all other wares, merchandise, articles, matters, or things;" the difference being only in the introduction of "hides," which, like the other articles specified, may be in the raw state; this gives no light. It was suggested that "manufactured goods" was, like "dry goods," a term of art, and denoted goods supplied from what are called the "manufacturing districts," and may be seen in warehouses and shops of drapers and haberdashers marked fabriques: and some such notion may have been in the
*109] mind of the framers *of these sections: but there are no clear indications of this; and it was certainly the duty of the defendants, if they had intended such a limitation of words, which in their natural meaning import a great deal more, to have taken care that such limitation should be expressed in unambiguous language. Forming the best judgment which we are able in so doubtful a matter, we think that the term "manufactured goods" must be understood in a popular sense, and must mean not merely goods produced from the raw state by manual skill and labour, but such as are ordinarily produced in manufactories; and we should therefore exclude stationery and include shoes, ironmongery, glass, and drapery. It should be observed, however, that, having given what we conceive to be the meaning of the term, the application of that meaning to particular articles is a question of fact, not of law; and what we have suggested in this respect is not to be taken as conclusive. But both as to this and to the following question, which we answer in the same way as to the principle, the arbitrator will have to apply it to the several articles enumerated, according to the evidence to be adduced before him.

The seventh question assumes that goods have been properly charged at tonnage rates respectively of $2\frac{1}{2}d.$ and $3d.$ per ton per mile; but, the defendants having charged, beyond these rates, sums for the loading, covering, and unloading them, they having rendered these services, the plaintiff disputes their right to make any such charge. But his objection seems untenable; for the 49th sect. of stat. 10 & 11 Vict. c.

ccxxvi., which fixes the tonnage rate, expressly states that it is to cover "every expense incidental to the conveyance, except a reasonable sum for," among other things, the "loading, *covering, and unloading," where such service is performed by the Company. Whether [*110 in the particular instances the sums charged by the defendants were reasonable, which the plaintiff denies, and the case omits to state them, we have no means of deciding.

The eighth and last question arises under these circumstances. For the carriage of goods from station to station the Company charge to all persons indifferently at certain rates: but, in order probably to attract business by facilitating the collection of goods and parcels in different parts of London, and their delivery at the Paddington station, as well as their carriage from that station and delivery to the respective consignees in different parts of London, they have entered into agreements with certain persons, whom they have constituted their agents. These persons have receiving houses in different parts, and horses, vans, carts, &c.; they collect and receive and book goods and parcels, and deliver them at the station; and they receive from the station and deliver goods and parcels to the consignees. For these services the defendants agree to pay them 3*s.* 4*d.* per ton, 2*d.* for delivery of each lot of parcels under 200 lbs., and for each separate parcel at 1*s.* 6*d.* per ton, the first being stated to be for cartage, the second for delivery and other small miscellaneous services, the third for agency, as to which it is guarantied that the tonnage shall amount annually to a certain quantity at the least. It is found by the case that the 3*s.* 4*d.* per ton and the two pennies are insufficient as a remuneration for the services performed, and that the deficiency is made up by the allowance of the 1*s.* 6*d.* per ton. The case does not expressly so state: but, from the argument on both sides, we infer that no question arises as to the 3*s.* 4*d.* or the small payments, *but only as to the 1*s.* 6*d.* per ton, [*111 which the plaintiff contends must in fact be defrayed by the defendants out of the moneys which they receive for the carriage of articles from station to station, and therefore that it is unequal to charge him who collects and brings his own consignments to and from the station the same sum only for carriage to another station, which is nominally charged for carriage only, but really for carriage, together with collection and delivery also, to those whose goods are brought to or from the station by the agents; and Pickford *v.* Grand Junction Railway Company, 10 M. & W. 399,† is relied on. This point for the plaintiff may be stated thus. The cost and charge for carriage from station to station being assumed at a certain sum, and the cost of bringing to or delivering from the Paddington station being assumed at an average of 5*s.* per ton, the portion of the public who send or receive their goods through the agents pay only 3*s.* 4*d.* or 3*s.* 6*d.* of this, and the residue, 1*s.* 8*d.* or 1*s.* 6*d.*, is paid for them by the Company. It is there-

fore in effect so much deducted from what they pay for the carriage of their goods from station to station; but the plaintiff, delivering and taking away his goods himself to and from the station, and being therefore charged the same sum really which they are only charged nominally by reason of this deduction, is charged unequally, which is contrary to the 50th sect. of stat. 7 & 8 Vict. c. iii. And, if this be the true character of the facts, the conclusion drawn appears to be correct: moreover it is the same which was come to by the Court of Exchequer in the case before mentioned. In that case, the total charge for
*112] *what were called "Manchester Packs" from Manchester to the Camden Town station of The London and North Western Railway Company being 65*s.* per ton, the defendant had made arrangements with certain carriers to forward them thence to the several consignees in different parts of London at 10*s.* per ton, deducted from the 65*s.*; and the Court held that it was unequal to charge the plaintiff 65*s.*, who, having a warehouse at Camden Town, received their goods at that place; for the public paid for the carriage from Manchester to Camden Town plus the carriage to London, no more than the plaintiff paid for the carriage to Camden Town only. If, instead of a part only of the 5*s.* per ton being paid by the defendants, they had paid the whole 5*s.* to their agents, the two cases it is said for the plaintiff would have been identical; and the difference between the whole or a part is immaterial in principle. It appears to us that the judgment of the Court of Exchequer was perfectly correct. But, for the reasons we are about to state, it ought not to govern our decision. The 50th sect., on which the plaintiff relies, is followed by a proviso in the 51st, expressly directed to arrangements for the delivery of goods and parcels: and by it the defendants are authorized "to enter into and make such arrangements as they may see fit with any company or person with regard to the collection or delivery of such goods, wares, merchandise, parcels, matters, and things, and upon such terms and conditions as the Company and the parties to such arrangements respectively may be willing to accept and abide by." If the clause had ended here, it would have been tolerably clear that the Legislature intended to keep distinct the two things, charges for conveyance and arrangements for
*113] collection and delivery; *to insist that all should be charged equally for conveyance, a matter very easily secured, when the equality required is limited to conveyance from and to the same stations; but to leave the Company open to make such arrangements as they could effect in regard to collection and delivery of parcels, in a view of the impossibility of avoiding some inequality, where they would be collected from and delivered to consignors and consignees at distances necessarily varying in every degree. It is to be observed that sect. 50 only requires equality, where the passengers or goods pass "over the same portion of and over the same distance along the said

railways." Nothing prevents the Company from charging A. more for carrying him twenty miles on one point, than they charge B. for carrying him the same distance on another part—or even from carrying at a loss on one part of the line, though the difference must be defrayed, as here it is alleged to be, out of the general receipts of the Company.

But this reasoning is much strengthened by what follows—the proviso namely for an appeal to the sessions, if any person considers that "the said Company have to his prejudice accorded any special facilities to any other such persons which they are unwilling to accord to him." This shows that a sort of equality was intended to be secured in this matter also, such an equality as might in fact be secured: whatever facility is afforded to any one as to collection and delivery must be open to all, if they will avail themselves of it; and, if the agents here had been forbidden to collect and deliver the plaintiff's parcels at 3*s*. 4*d*. or 3*s*. 6*d*., he would have been within the proviso, and might then, not indeed have brought this action, but taken the special course provided by the Act, *and appealed to the sessions. This however is not the grievance complained of; and we think for the reasons given that on this point the plaintiff's case fails. [*114

Upon the whole case our judgment therefore is for the defendants: but the case must go back, if required by either party, to the arbitrator, to apply the principles we have laid down in respect to the fifth question. Judgment for defendants.

JOHN CLAYTON, plaintiff, *v.* THOMAS FENWICK, defendant.

Feb. 23.

The general Board of Health made a provisional order extending The Public Health Act, 1848, to T., a district within which were parts of the S. turnpike roads, made under local turnpike Acts. A local sanitary Act also applied to the district. The provisional order altered the local sanitary Act, and directed, inter alia, that, from and after the passing of any Act of Parliament confirming that order, sect. 50 of The Towns Improvement Clauees Act, 1847, should be incorporated with the local sanitary Act. The order was confirmed by statute "so far as" "authorized by The Public Health Act." The Towns Improvement Clauses Act, 1847, sect. 50, forbids trustees of any turnpike road from levying toll within the limits of the special Act. The surveyor of the Local Board of T., by their order, removed the S. turnpike gates within the district. The clerk of the S. turnpike trustees sued him in trespass for so doing.

On a case stating the above facts,

Held by Coleridge, Erle, and Crompton, Js., that the part of the order incorporating The Towns Improvement Clauses Act, 1847, sect. 50, was not authorised by The Public Health Act, 1848, and was void; and the plaintiff had judgment. Lord Campbell, C. J., dissentiente.

TRESPASS for removing the turnpike gates hereinafter mentioned, placed upon the road from Newcastle upon Tyne to North Shields. Plea: Not guilty, by statute. Issue thereon. A case was stated for the opinion of this Court, in substance as follows.

The plaintiff is the clerk to the trustees for putting into execution

*115] stat. 1 & 2 W. 4, c. lxxii.(*a*) The gates removed *by the defendant are described in the declaration, and commonly known as the Chirton gate, the Chirton side gate, the Tynemouth gate, the Percy Main gate, and the Percy Main side gate. The Chirton gate, the Tynemouth gate, and the Percy Main gate were severally erected across the main line of road. The Chirton side gate was erected as a check gate on the side of the main line of road at the point where a township road leaves the main line of road near to the Chirton main gate. The Percy Main side gate was erected as a check gate across a branch road leading into the main road at the point where the branch road adjoins the main road. The defendant is the surveyor of The Local Board of Health of the borough of Tynemouth in the county of Northumberland. The limits of the said borough of Tynemouth were settled and described in stat. 2 & 3 W. 4, c. 64.(*b*) The borough includes within the limits the townships of Tynemouth, North Shields, Chirton, Preston, and Cullercoats. The object of this action and case is to ascertain whether the trustees were entitled to maintain the turnpike gates, or any of them, and levy thereat the tolls granted by the said Act, under the circumstances hereinafter mentioned.

The turnpike road, hereafter called the North Shields road, has always been a public highway: and it was first made a turnpike road by an act passed 22 G. 2, c. 9; which Act was continued and amended by the subsequent Acts, which are recited in and repealed by stat. 1 & 2 W. 4, c. lxxii.

*116] Stat. 9 G. 4, c. xxxvii.(*c*) is hereinafter called "The *North Shields Improvement Act." Commissioners were appointed for carrying the said act into execution: and by sect. 5 certain limits of the town of North Shields were fixed for the purposes of the Act. By sect. 25. the Commissioners were directed and required to cause the then present and future streets, lanes, and public passages, and places, as well carriageways as footways, within the said limits to be repaired, made, formed, amended, and sustained in such manner as the said Commissioners should think proper: and by sect. 27 it was enacted "that from and after the commencement of this Act, so much and such part of the turnpike roads passing into or through the said town of North Shields, on both sides whereof houses now are or hereafter shall be erected or built, as lie within the limits of this Act, shall cease to be part of such turnpike roads, and the trustees of such turnpike roads shall not contribute towards the repairs thereof." A part of the North Shields road lies within the limits of the North Shields Improvement Act; and a

(*a*) Local and personal, public: "For more effectually repairing the road from North Shields in the county of Northumberland to the town of Newcastle upon Tyne, and certain branches communicating therewith; and also for making and repairing additional branches of road."

(*b*) Schedule (O.) 26.

(*c*) Local and personal, public: "For paving, lighting, watching, cleansing, regulating, and improving the town of North Shields, in the county of Northumberland."

portion of such part of the said road has, since the said Improvement Act was passed, been repaired by the Commissioners for carrying that Act into execution, and not by the trustees under the said turnpike Acts or any of them; but none of the said gates were situate within such limits.

By stat. 1 & 2 W. 4, c. lxxii., after repealing the recited Acts(*a*) and appointing trustees for putting the Act into execution, and authorizing the trustees to demand and take certain tolls in the said Act specified, it is enacted, in sect. 18, "that no part of the money to be received by virtue of the said former Acts hereby repealed, or of this Act, shall be laid out in paving, repairing, or cleansing any street, road, or highway within *the liberties of the town of Newcastle-upon-Tyne, or any other town or place through which the said road and branches may pass, and which street, road, or highway now hath or hereafter shall have houses or other buildings abutting upon or ranging along both sides thereof, nor shall it be lawful for the said trustees to collect any toll in any such street, road, or highway; anything herein contained to the contrary notwithstanding." [*117

On the 6th day of August, A. D. 1849, Her Majesty, Queen Victoria, by charter incorporated the inhabitants of the district comprised within the limits of the said borough of Tynemouth, settled and described as before mentioned, by the name of "The Mayor, Aldermen, and Burgesses of the Borough of Tynemouth;" and Her said Majesty by the said charter extended to the inhabitants of the said borough, comprised within the said district, all the powers and provisions of the Act of Parliament for regulating municipal corporations in England and Wales, and of all and every other Act or Acts of Parliament for altering, amending, or enlarging the same; and Her Majesty by her said charter directed that the council of the said borough should consist of a Mayor, six Aldermen, and eighteen Councillors, to be elected in manner therein mentioned.

By sect. 10 of The Public Health Act, 1848 (11 & 12 Vict. c. 63), The General Board of Health are authorized to make such provisional orders under their hands and seal of office, with such provisions, regulations, conditions, and restrictions, with respect to the application and execution of that Act or any part thereof, and with respect to any local Act, and the repeal, alteration, extension, or future execution of the same, in all respects whatsoever, as they may think necessary under all the circumstances of the case.

*On the 25th day of July, A. D. 1851, a provisional order was made by The General Board of Health under their hands and seal of office: whereby (after reciting, among other things, that the Commissioners for putting in execution the said North Shields Improvement Act did, at a meeting of the said Commissioners, specially called [*118

(*a*) Stat. 9 G. 4, c. xxxvii., is not among these.

for that purpose on the 28th day of December, A. D. 1849, resolve and agree to transfer to The Mayor, Aldermen, and Burgesses of the Borough of Tynemouth the power vested in them by the said Improvement Act, and that the said Commissioners, by writing under their hands and seals, did transfer such powers accordingly unto The Mayor, Aldermen, and Burgesses of the Borough of Tynemouth), the said General Board of Health directed, among other things, That, upon and after the passing of any Act of Parliament confirming that order, "The Public Health Act, 1848," and every part thereof, except section 50 and a part of section 88, should apply to and be in force within and throughout the entire area, places and parts of places, comprised within the boundaries of the said corporate borough of Tynemouth, as the same were fixed as aforesaid, and the said corporate borough, places and parts of places, should be and constitute one district for the purposes of the Public Health Act. That The Mayor, Aldermen, and Burgesses of the Borough of Tynemouth should be, by the council of the said borough, within and for the said corporate district, the Local Board of Health under that Act. That, from and after the passing of the Act of Parliament confirming that order, the aforesaid transfer to the said Mayor, Aldermen, and Burgesses of the powers vested in the Commissioners for putting in execution the said North Shields Improvement Act should be confirmed. That, from and after the passing of any

*119] *Act of Parliament confirming that order, such provisions of the said North Shields Improvement Act as are specified in the schedule to the said order annexed should be repealed, except in so far as such provisions or any of them related to any rate, assessment, composition, mortgage, assignment, or annuity, made, executed, or granted, or to any act, matter, or thing done, before the passing of any Act of Parliament confirming that order, and except in so far as the same repeal any other Act or Acts of Parliament. That, from and after the passing of any Act of Parliament confirming that order, the said Local Board should be the commissioners for executing such parts of the said North Shields Improvement Act as should not be repealed according to that order; and that all lands, buildings, works, &c., vested in the Commissioners acting in execution of the said Improvement Act, should be transferred to and vested in the said Local Board of Health. That, from and after the passing of any Act of Parliament confirming that order, all parts and places within the said borough of Tynemouth should be within and subject to such of the provisions of the said Improvement Act as should not be repealed according to the provisions of that order; and that, from and after the passing of any Act confirming that order, the said Local Board of Health should by order under the corporate seal of the said borough, and referring or not to a map or plan of the said corporate district, ascertain and fix the part of the said corporate district, within which the streets, lanes, highways,

turnpike and other roads, squares, public passages and places, markets and public buildings were to be lighted; and the said Local Board of Health should and might, from time to time thereafter, by orders under the said corporate seal, vary and alter the part of the said corporate district so *to be lighted as aforesaid. That, from and after the [*120
passing of any Act of Parliament confirming that order, certain sections of The Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), and certain sections, and among others sect. 50, of The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), should be incorporated with so much of the said North Shields Improvement Act as should remain unrepealed by that order, and with the said Public Health Act as applied to the said corporate borough by that order, and any Act of Parliament confirming the same: and that the expression "The Special Act," used in the sections, should be construed to mean so much of the said local Act as remained unrepealed, and the said Public Health Act so applied as aforesaid; and the expression "limits of the special Act," used in the same sections, should be construed to mean the district, constituted by that order and any Act of Parliament confirming the same, for the purposes of the said Public Health Act; and the expression "the Commissioners," used in the said sections, should mean the said Local Board. Sects. 25 and 27 of the said North Shields Improvement Act (which are hereinbefore set out in this case) are not mentioned in the schedule referred to in the said order. The 50th sect. of "The Towns Improvement Clauses Act, 1847," mentioned in the provisional order, is as follows. "The trustees of any turnpike road shall not collect any toll on any road within the limits of the special Act, or lay out any money thereon."

On the 8th day of August, A. D. 1851, an Act, 14 & 15 Vict. c. 103, was passed, by which (*a*) the said provisional order, so far as the same was authorized by the Public Health Act, was declared to be absolute, and to "be as *binding and of the like force and effect as if the [*121
provisions of the same had been expressly enacted in this Act."

The case then described the position of the gates by reference to a plan on a large scale attached to the case, on which were shown minutely the position of the gates, and what houses were near them. It is not necessary for the purposes of the report to explain the position of the gates. The case then proceeded.

On the 7th January, A. D. 1852, the council of the said borough, acting as such Local Board of Health, had occasion to use the said North Shields road with their carts and horses, and for that purpose to pass over the sites of the said turnpike gates (describing them). By the order of the trustees for putting into execution stat. 1 & 2 W. 4, c. lxxii., the said turnpike gates were fastened across the said roads; and the said trustees refused to allow the said carts and horses to pass

(*a*) Sect. 1.

through the said gates or any of them, except on payment of the tolls mentioned in the said Act. Whereupon the defendant, being such surveyor as aforesaid, and intending to act under the provisions of "The Public Health Act, 1848," and by the directions of the council of the said borough acting as such Local Board of Health, as aforesaid, removed the said gates in a proper and careful manner, and passed over the sites thereof with the said carts and horses, and in so doing committed the trespass complained of.

It is admitted the action was brought in due time, and after proper notice: and, in case any fact or statement is omitted or requires alteration in order to raise the points intended to be decided, it is agreed that such omission shall be supplied and alteration made. In case *122] *the parties disagree as to any such fact, the same is to be ascertained and certified to the Court by Mr. John Tinley of North Shields, solicitor.

The questions for the opinion of the Court are:

1st. Whether the trustees for putting into execution stat. 1 & 2 W. 4, c. lxxii., are entitled to collect the tolls mentioned in that Act within the borough of Tynemouth.

2d. Whether the said trustees were entitled to maintain the said turnpike gates or any of them at the said points at which they respectively stood as described in the case, and to levy at the said gates or any of them the tolls mentioned in the said Act.

If the Court shall be of opinion that the said trustees were entitled to maintain the said turnpike gates, or any, or either of them, and to levy the said tolls thereat, then the plea of the defendant is to be withdrawn, and judgment entered for the plaintiff with 20*l.* damages. If the Court shall, on the said second question, be of opinion that the said trustees were not entitled to maintain any or either of the said gates, then the plaintiff is to enter a nolle prosequi in the said action. The costs of this case, and of the arguments, are to be costs in the said action, and to abide the event thereof. Provided, and it is agreed between the parties, that, if the judgment of the Court should be for the plaintiff in respect only of the Percy Main gates, or one of them, no damages shall be levied against the defendant; and that each party shall pay his own costs.

The case was argued in Trinity term, June 5, 1855.(*a*)

H. Hill, for the plaintiff.—If that part of the provisional order, *123] which incorporates The Towns *Improvement Clauses Act, 1847, sect. 50, has the force of an Act of Parliament, these gates were no doubt illegal, and the defendant is entitled to judgment. If that part of the order is void, there arises a further question of fact, viz., whether the local situation of the gates is such as to bring them within the sections of the local Acts prohibiting the levying of toll

(*a*) Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, Js.

where houses are continuous. The first point is one of general importance. The tolls on this turnpike road are mortgaged: that of course cannot affect the construction of the Act; but the fact that turnpike tolls are often mortgaged is important in considering whether the Legislature is likely to have delegated power to the General Board of Health to take away the tolls within a district, which may form the whole or the principal part of the security of the mortgagees. Stat. 14 & 15 Vict. c. 103, as is usual, confirms the provisional orders "so far as they are authorized by the Public Health Act." The Public Health Act, 1848, sect. 10, provides that the whole or part of the Act may be applied by order in council to a district "within which there is no local Act of Parliament in force for paving, lighting (otherwise than for the profit of the proprietors or shareholders), cleansing, watching, regulating, supplying with water, or improving such" district, "or in any wise relating to the purposes of this Act." And it provides that, if The General Board of Health think it expedient that the Act or part of it should be put in force within any place "in which any such local Act of Parliament as aforesaid is in force, they shall make a provisional order under their hands and seal of office accordingly, with such provisions, regulations, conditions, and restrictions with respect to the application and execution of this Act or any part thereof, and with respect to any such local Act, and the repeal, alteration, *extension, or [*124 future execution of the same, and in all respects whatsoever, as they may think necessary under all the circumstances of the case." And if that order is confirmed by Act of Parliament it is to have the same effect as if expressly enacted. This gives no authority to make a provisional order except for the application of The Public Health Act, 1848, or for the alteration of some local Act relating to its purposes. But turnpikes are expressly excluded from the highways over which the local Board have jurisdiction: and it can hardly be said that the levying of toll affects the public health.

The arguments as to whether the gates were so situated as to fall within the provisions of the local Acts are omitted, the question not being of general importance.

S. Temple, for the defendant.—The language of the 10th section of the Public Health Act, 1848, is very general. It may be admitted that it would not authorize the insertion of any enactment unconnected with the purposes of public health or the local Acts; but it is within the scope of their authority to alter and extend The North Shields Improvement Act; and sect. 50 of The Towns Improvement Clauses Act, 1847, is in substance an extension of sect. 27 of The North Shields Improvement Act.

As to the minor question, he admitted that the Percy Main gates were not so situated as to be unlawful within sect. 27 of The North

Shields Improvement Act. The arguments as to the situation of the other gates are omitted.

Hill was heard in reply. *Cur. adv. vult.*

*125] *In this Vacation (February 23d), there being a difference of opinion on the Bench, separate judgments were delivered.

ERLE, J., read his judgment, which he stated CROMPTON, J., to have read and to agree in.

In this case the defendant claimed to justify the removal of the turnpike gates within the borough of Tynemouth under the powers of The Local Board of Health, derived from the provisional order of The General Board of Health, confirmed by stat. 14 & 15 Vict. c. 103, so far as it was "authorized by The Public Health Act," 1848 (11 & 12 Vict. c. 63). That provisional order incorporated with it sect. 50 of The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), which enacted that "the trustees of any turnpike road shall not collect any toll on any road within the limits of the special Act, or lay out any money thereon." And the gates in question were removed from a part of the Newcastle turnpike road which is locally situate within the boundary of the borough of Tynemouth. He relied on two grounds to prove the validity of this part of the provisional order. 1st. That, by section 10, The General Board of Health, in a case for applying that Act to a borough with a local Act, was authorized to make a provisional order with such regulations in all respects whatsoever as it might think necessary; and, secondly, if this construction cannot be sustained, that the General Board in such a case was authorized by that section to make a provisional order, with such regulations in respect of the alteration and extension of the local Act as it might think necessary: that the local Act for North Shields (9 G. 4, c. xxxvii.) s. 27, enacted in effect that so much of the turnpike road passing through

*126] North Shields as lies *between houses built on both sides thereof shall cease to be turnpike and not be repaired by the trustees, and that the provisional order applying sect. 50 from The Towns Improvement Clauses Act, 1847, was an alteration and extension of this section in the local Act, and so was authorized by The Public Health Act, 1848.

I am of opinion that neither ground can be sustained.

The power given by the Public Health Act, 1848, sect. 10, to the General Board of Health, which is here in question, is to make a provisional order *for the purpose* of applying the Public Health Act to the borough; and all the general provisions, and all the special provisions for the alteration of the local Act, are to be such as they think necessary under the circumstances *for this purpose.* If the boundaries are not to be altered, or if there is no local Act, the Public Health Act is to be applied simpliciter. If the boundaries are to be altered, or if there is a local Act to be blended with the public Act, there must be

such a provisional order as either or both of these purposes may require. The effect of the section is that, if the Public Health Act is to be applied where there is a change of boundary, or where there is a local Act, the General Board shall make a provisional order accordingly, with the regulations which they think necessary under the circumstances. This is not an absolute power of propounding for legislative confirmation, either simpliciter or by way of altering a local Act, what the Board thinks necessary, but a power limited to a definite purpose. And, though it may be said that an absolute power of propounding cannot hurt, as it remains with the Legislature to confirm, it is to be observed that the effect of every clause in a proposed bill is not easily foreseen; and the Legislature had practical reason for limiting the power of *propounding in the provisional order: and it has referred to the same limit in confirming, as far as "authorized," and no farther. [*127 The provisional order in question, by importing sect. 50 from The Towns Improvement Clauses Act, 1847, proposes to *disturnpike* all the turnpike roads within the limits of the borough, and to destroy the property of the mortgagees of tolls to that extent there: and can such a regulation be said to be necessary for applying the Public Health Act and altering the local Act so as to be applied therewith? It seems to me that the answer must be in the negative, and that, so far from authorizing it, the Legislature has declared its intention to prohibit it. By sect. 2, "*street*," in this act, is to include any highway not being turnpike. By sect. 68, all present and future streets, which include highways and roads not being turnpike, shall vest in and be under the control of The Local Board of Health, and The Local Board shall cause all such streets to be repaired. It thus appears that turnpike roads are expressly excepted out of the highways under the control of The Local Board: they have no right to repair them or to lay out money about them, except in such cases as where is to be an ultimate resort to The Local Board as surveyors of highways, for contribution where the turnpike funds have failed. By sect. 117, the inhabitants of a district under a Local Board, in respect of property within the district, are exempted from payment of highway rate, or other payment, not being toll, for repair of highways in any place out of the district. The exception of toll here includes turnpike toll; and the exception of such toll, out of the exemption, by implication declares they shall remain liable to turnpike toll. The provision for notice to all *parties whose interest shall be affected by the provisional order leads to the conclusion that turnpike [*128 trusts were not to be affected. Sects. 9 and 10 require full information of intended proceedings to be given in the places to be affected thereby, and specifically to the town clerk of any corporate body to be affected thereby, and to the clerk of the commissioners or trustees acting under any local Act for lighting, watching, paving, watering, or improving any place to be so affected; and to the clerk of the justices acting for any

petty sessional division within such place, and to the clerk of the Board of Guardians of any union within such place. If the Legislature intended that the property of turnpike trustees might be taken away, there would be more reason for informing them than many of the parties above specified, of a matter so important to their interest; but they are not specified: and this seems to me also to show that they were not to be affected by the Board of Health, and then no notice could be necessary. If we refer to the Towns Improvement Clauses Act, 1847, from which sect. 50 was to be imported, we find that turnpikes are not excepted from the streets placed under the control of the commissioners created by that act. The express exception of turnpikes out of the definition of *streets* in the Act of the following year seems to me intended to give security to the property invested in turnpike roads. For these reasons I think that the order in question, incorporating sect. 50 above mentioned, was not authorized by the general power for making a provisional order, nor as an alteration of the local Act.

The further and minor question remains, whether the removal of these gates can be justified on the ground *that they were within the prohibition either of the 27th section of the North Shields Act or of the 18th sect. of the turnpike Act. Both prohibitions seem intended for the same effect; they contemplate the growth of towns, and prohibit turnpike gates within such streets of towns as have houses or buildings ranging along both sides thereof. This description of streets, and also the terms "towns" and "streets," are not precisely defined. The Legislature perhaps intended to indicate some such principle as this: that those who travel should pay, while those who move in the home concerns of daily life in a town should be free. But, whatever was the principle intended, I am of opinion that the Legislature did not intend to *disturnpike* every fragment of the line which should happen to be between two opposite buildings. It was conceded during the argument that the Percy Main gates were lawful: and, after considering the local situation of each of the gates in question as described in the plan, and comparing it with the prohibition in the two last Acts referred to, I have come to the conclusion that neither the Tynemouth nor the Chirton gates are within either prohibition. It follows that they were not prohibited; the removal of them, therefore, was unlawful; and the judgment as to these also ought to be for the plaintiff.

*129]

COLERIDGE, J.—This case depends, as to its principal point, on the validity of a provisional order of the Board of Health, dated 25th July, 1851, which has been confirmed by stat. 14 & 15 Vict. c. 103, so far as it was authorized by The Public Health Act, 1848. The single question therefore is, Whether, in the part of it under which the defendant acted, it was so authorized? If it *was, he was justified in the act complained of: if not, our judgment must be against him. By sect. 10 of The Public Health Act, 1848, The General Board of

*130]

Health may, under the circumstances there stated, and which may be taken as applicable here, make a provisional order with such provisions, regulations, conditions, and restrictions with respect to the application and execution of this Act, or any part thereof, i. e., the Public Health Act; and with respect to any such local Act (which reference I will explain presently), and the repeal, alteration, extension, or future execution of the same, and in all respects whatsoever, as they may think necessary under all the circumstances of the case. Under this power the provisional order has been made: and it, in terms, renders applicable to this borough of Tynemouth several clauses of The Town Police Clauses Act, 1847, and of The Towns Improvement Clauses Act, 1847; among others, sect. 50 of the latter. I quite agree that these clauses so introduced do not acquire any validity here from their being parts of those Acts of Parliament. I look upon them only as borrowed from those Acts, and adopted in terms as new provisions by the Board: and the question is, Did sect. 10 of the Public Health Act authorize the Board to make such a provision as that which is found in sect. 50? It is this: "the trustees of any turnpike road shall not collect any toll on any road within the limits of the special Act, or lay out any money thereon." I am of opinion they were not so authorized. The provisional order may, by sect. 10, deal with three things. 1st. The application and execution of the Public Health Act. 2d. With "such local Act" and the repeal, alteration, extension, or future execution thereof. 3d. "And in all respects *whatsoever as they may think necessary under all the circumstances of the case." [*131

Now, first: The provision in question is not found in the Public Health Act: it is not therefore justified as an application of that Act. 2d. The local Act here spoken of must be, by the same section 10, a local Act "for paving, lighting (otherwise than for the profit of proprietors or shareholders), cleansing, watching, regulating, supplying with water, or improving" the borough, "or in any wise relating to the purposes of this Act," the Public Health Act. But the local Act under which the gates pulled down were erected and standing is stat. 1 & 2 W. 4, c. lxxii., a mere turnpike Act; and the trustees who carry it into execution are expressly forbidden from expending any money received under it in paving or repairing any street, or collecting any toll in it. Nor does it in any way relate to the purposes of the Public Health Act. It is clearly therefore not such a local Act as the 10th section contemplates. If therefore the order can be sustained, it must be under the very general words which form the third and last branch. These words, it is admitted, are so general that they must receive some limitation: and the only question is, whether the limitation shall be wide enough to include the provision in question. The words "in all respects whatsoever" cannot, I think, be dissevered entirely from what precedes, relating to the Public Health Act, and the local Act: it would

be hardly grammatical to say, without more, that the Board might make an order in all respects whatsoever as they might think necessary; and, if grammatical in language, the section would give a monstrous power never contemplated. It must therefore be read with reference to what precedes: and I *think the words were introduced merely out of caution, to give the Board power as to the Public Health Act, and the local Act, if any, in all such respects, if any, as had not been covered by the special words preceding. But, even if a wider construction be proper, and they extend to any matter concerning the health of the borough, it appears to me not maintainable to hold that the existence of a toll gate across a road, or the collection of tolls there, has any connexion whatever with the health of the inhabitants of the borough. I think, therefore, on this short ground, that the order is bad; and, consequently, that the plaintiff is entitled to our judgment. With respect to the extent of the judgment, I agree with my brother Erle that it must extend to the Tynemouth and Chirton gates, as well as to the Percy Main gates.

*132]

Lord CAMPBELL, C. J.—The first question submitted to us in this case is, Whether the trustees under the local Act, 1 & 2 W. 4, c. lxxii., for repairing the road from North Shields to Newcastle, are entitled to collect the tolls mentioned in that Act within the borough of Tynemouth; and it is admitted that, if this question be answered in the negative, the other questions are immaterial, and judgment must be given for the defendant. The trustees are entitled to collect the tolls in question within the borough of Tynemouth, unless their authority to do so is taken away by the provisional order of the Board of Health, dated 25th July, 1851, for the application of The Public Health Act, 1848 (11 & 12 Vict. c. 63), to the borough of Tynemouth; this provisional order having been confirmed, along with several others, applicable to other towns, by stat. 14 & 15 Vict. c. 103, which *enacts that these provisional orders shall, "*so far as they are authorized by the Public Health Act*, be absolute, and be as binding and of the like force and effect as if the provisions of the same had been expressly enacted in this Act." By this provisional order, it is ordered and directed that several enumerated sections of The Towns Improvement Clauses Act, 1847, shall be incorporated with the said Public Health Act, as applied to the corporate borough of Tynemouth; and among these is section 50, whereby it is enacted that "The trustees of any turnpike road shall not collect any toll on any road within the limits of the special Act, or lay out any money thereon." It is admitted that, if the introduction of this section of the Towns Improvement Clauses Act into the provisional order is authorized by the Public Health Act, it would take away the right of the trustees of this road to collect the tolls referred to within the borough of Tynemouth. The power of the Board of Health to make such a provisional order is regulated by the

*133]

10th section of stat. 11 & 12 Vict. c. 63, which enacts that "they shall make a provisional order under their hands and seal of office accordingly, with such provisions, regulations, conditions, and restrictions with respect to the application and execution of this Act or any part thereof, and with respect to any such local Act, and the repeal, alteration, extension, or future execution of the same, *and in all respects whatsoever as they may think necessary under all the circumstances of the case.*" It is contended, on the part of the trustees, that, as no power is here given to introduce any part of The Towns Improvement Clauses Act into the provisional order, the introduction of section 50 of that Act is unauthorized and void. But I conceive that the scheme pursued by the *Board of Health in framing these orders, by reference to sections of Acts of Parliament, is unexceptionable, if they do not exceed their authority by the subject-matter of the sections they introduce. A section so introduced has no validity from its forming part of an Act of Parliament; but, if the substance of it might have been introduced into the provisional order, there being no prior enactment to that effect, no objection can be made to it because it is introduced by reference from the statute books; verba relata inesse videntur. [*134

Objection is then made that the prohibition to the trustees acting under stat. 1 & 2 W. 4, c. lxxii., to collect the tolls mentioned in that Act within the borough of Tynemouth, which arises from the introduction of section 50 of The Towns Improvement Clauses Act into the provisional order, is not authorized by the Public Health Act, and therefore is ultra vires. As the law stood when the Public Health Act passed, the trustees certainly might have collected these tolls within the area forming the borough of Tynemouth; and, if full effect is given to the provisional order, it will operate pro tanto as a repeal of the local Act, by which the tolls might be so collected. Nevertheless, I think that the provisional order in this respect is authorized by the Public Health Act. The Board of Health could not proprio vigore repeal any provision in any Act of Parliament, general or local. By their provisional order they only make a proposal, which has no force till it is adopted by the Legislature; and anything in the provisional order which they had not authority to propose for adoption in their provisional order would have no force by a confirming statute, framed as this is. If they were to direct, by a provisional order, that within the limits of a borough *the second son shall be heir to the father, instead of the eldest son, this would not be authorized by the Public Health Act and would be void; for there is authority to include in the provisional order only matters respecting the sanatory condition of the town, and any such local Act as is referred to; but, within this scope, they may include whatever they may think necessary under all the circumstances of the case. Suppose that sect. 18 had not been found in stat. 1 & 2 W. 4, c. lxxii., might not the provisional [*135

order have proposed that there should be no turnpike gate erected across the streets of Tynemouth, or, in other words, have proposed to introduce sect. 50 of The Towns Improvement Clauses Act? Sect. 18 is to be found in stat. 1 & 2 W. 4, c. lxxii.; but is there any difference between proposing a new law upon this subject and altering or repealing an old one? A proposed enactment respecting anything over which the Board of Health has jurisdiction seems to me to be authorized by the Health of Towns Act. Under the circumstances of this case, the Board of Health thought it expedient that turnpike gates should not be allowed to be erected or to stand within the limits of the borough; and, with this view, they introduce into the provisional order sect. 50 of the Towns Improvement Clauses Act. This is only a proposal to the Legislature; and, with very great submission, it is closely connected with the health of the inhabitants. If there were barriers across all the principal streets of the town, which no foot passenger could pass without paying toll, they would surely materially interfere with the health of the inhabitants; and turnpike gates across the streets of a town applicable only to carriages and horses appear (although in a less degree) to have a similar tendency.

*136] *I conceive therefore that the Board of Health had authority to make a proposal to the Legislature, that there should be no such impediment in the town of Tynemouth, to the inhabitants having wholesome exercise and recreation and carting away the filth which might accumulate in their streets and in their houses. Before adopting the proposal and making it law, the two Houses of Parliament must be taken to have deliberated upon its expediency, and to have heard all who thought that their interests were affected by it and who came before them to oppose it. Much reliance was placed by the counsel for the trustees upon the fact that the tolls were mortgaged; but the mortgagees must have had an opportunity of being heard against the alteration of the local Act. If they would be aggrieved by it, the proposal to introduce the enactment would have been rejected, and an exception as to the sect. 50 of the Towns Improvement Act would have been introduced into the confirming statute. Thus it appears that the alteration or repeal of the local Act, as to the erecting of turnpike gates and the collecting of tolls within the borough of Tynemouth, is enacted by Parliament, whose power is unlimited. On looking into this provisional order, and others of the same kind, I find that various sections of other statutes are introduced into them by reference in the same manner: and I am afraid that it would have led to very great confusion if we were to hold that they are not binding under such a confirming statute: but, in as far as they are within the scope of the authority of the Board of Health in framing a provisional order, I think that they have the same operation as if introduced in so many words into a local Act of

Parliament for the better government of the borough. *It seems to me therefore that the present action is not maintainable, and that there ought to be judgment for the defendant: but, as my Brothers are of a different opinion, there must be judgment for the plaintiff in the terms in which they propose. Judgment for plaintiff. [*137

THE QUEEN *v.* CHARLES ROBERT BADGER. *Feb.* 23.

A complaint under the Metropolitan Building Act, 7 & 8 Vict. c. 84, s. 79, was preferred to the Quarter Sessions by W., in which W. stated that B. was district surveyor of L., and that W. built in L. three dwelling-houses of the fourth rate, and that three privies, attached to the back of and belonging to them, one to each house, were built and carried up at the same time, and covered in within twenty-one days after the dwelling-houses had been covered in; and that B. first delivered an account claiming 2*l.* 2*s.* "in respect of each of the said dwelling-houses," which was paid to him, and afterwards an account of 10*s.* "in respect of each of the said privies," and did, on, &c., "in his capacity of surveyor as aforesaid, wilfully receive the same from this complainant, he," B., "not being entitled thereto under the said Act. And so the said" W. "complains" that B., "in his capacity of surveyor as aforesaid, did, on the day and year last aforesaid, in manner and form aforesaid, unlawfully demand and receive a fee to which he was not entitled under the said Act: contrary to the provisions of the said Act." The Sessions made an order, stating that, upon hearing a complaint of W., in writing, against B., setting forth the nature and particulars of the offence charged, and alleging that B., "in his capacity as surveyor as aforesaid, had demanded and wilfully received a fee to which he was not entitled under the said Act, contrary to the provisions of the said Act," and upon hearing counsel on behalf of complainant and B., and also B., and the evidence for each, "it appears unto this Court that the said complaint is well founded:" and the Court dismissed B. from the office of surveyor.

The order of Sessions was removed by certiorari; and motion was made to quash it. Sect. 104 enacts that it shall not be lawful to remove any order, made under the Act, by certiorari.

It appeared by affidavit that the second fee was claimed on the ground that, within the meaning of the Act, the privies had not been covered over within the twenty-one days, and were distinctly rated; on which ground also B. had insisted at Sessions, but which W. had disputed.

Per Coleridge, Wightman, and Erle, Js., order quashed for want of jurisdiction. Per Coleridge, J., because sect. 79 gave jurisdiction to the Sessions in cases only where, supposing the surveyor to have done all he asserted himself to have done, he would still be entitled to no remuneration. Per Erle, J., because the jurisdiction was given only in cases where the offence brought before the Sessions was that of claiming a fee to which the surveyor knew himself not to be entitled, whereas there was here a bonâ fide dispute as to the law.

Dissentiente Lord Campbell, C. J., on the ground that the complaint in effect charged the offence of intentionally, fraudulently, and knowingly taking a fee to which the surveyor was not entitled; and that this showed jurisdiction; which was not affected by the affidavits.

THE following complaint was presented to the justices therein named:

*"To the Worshipful Her Majesty's Justices of the Peace in and for the Western Division of the county of Kent, in General Quarter Sessions assembled." [*138

"The undersigned, David Willoughby, of Forest Hill, in the parish of Lewisham, in the western division of the said county of Kent, grocer, humbly complains and represents to you, the said justices, that Charles Robert Badger was, under the provisions of the Act," &c. (7 & 8 Vict. c. 84, "for regulating the construction and the use of buildings in the metropolis and its neighbourhood"), on or about 10th of December, 1844, "appointed district surveyor of the parish of Lewisham, in the

western division of the said county of Kent; and that he, the said C. R. Badger, hath from thence hitherto held, and still holds, the said office of, and acts as, district surveyor for the said parish. That your complainant, the said D. Willoughby, did, in the year 1853, erect and build three dwelling-houses, of the fourth rate within the meaning of the said Act, adjoining each other, at Perry Vale, in the said parish of Lewisham. That the said dwelling-houses were carried up and covered in by the 29th day of November, 1853. That three privies attached to the back of, and belonging to, the said dwelling-houses, being one privy to each house, were, each and all of them, built and carried up at the same time with the said dwelling-houses, and were covered in by the 2d day of December, 1853, and within twenty-one days after the said dwelling-houses had been covered in within the meaning of the above-mentioned Act. That, in the month of December, 1853, the said C. R. Badger, as such surveyor as aforesaid, delivered to this complainant an account claiming a fee of 2*l.* 2*s.* in respect of each of the said
*139] dwelling-houses, amounting together to *the sum of 6*l.* 6*s.*, as being due to him as such surveyor. That such last-mentioned sum was duly paid by this complainant to the said C. R. Badger, on or about the 12th day of January, 1854. That subsequently, in the month of February, 1854, the said C. R. Badger, as such surveyor as aforesaid, delivered another account to this complainant, claiming a fee of 10*s.*, as due to him as such surveyor in respect of each of the said privies, making together 1*l.* 10*s.*, and did demand of this complainant payment of the said last-mentioned sum, and did, on the 14th day of July, 1854, in his capacity of surveyor as aforesaid, wilfully receive the same from this complainant, he, the said C. R. Badger, not being entitled thereto under the said Act. And so the said D. Willoughby complains to you, the said justices, that the said C. R. Badger, in his capacity of surveyor as aforesaid, did, on the day and year last aforesaid, in manner and form aforesaid, unlawfully demand and receive a fee to which he was not entitled under the said Act: contrary to the provisions of the said Act." Dated 18th October, 1854.

On this information, the following order was made:

"Kent. At the General Quarter Sessions of the Peace of our Lady the Queen, holden at Maidstone, in and for the county of Kent, on," &c. (5th April, 18 Vict.): "Upon hearing a complaint of D. Willoughby," &c., "in writing under his hand, against C. R. Badger, district surveyor," &c., "setting forth the nature and particulars of the offence charged by the said complaint, and alleging that the said C. R. Badger, in his capacity of surveyor as aforesaid, had demanded and wilfully received a fee to which he was not entitled under the said Act, contrary
*140] to the provisions of the said Act; and, upon *hearing counsel on behalf of the said complainant, and also upon hearing counsel on behalf of the said C. R. Badger, and also upon hearing the said C. R. Badger and the evidence respectively produced by and for each

of them the said D. Willoughby and C. R. Badger: It appears unto this Court that the said complaint is well founded: and this Court doth discharge the said C. R. Badger from his said office forthwith."

Horn, in last Easter Term, obtained a rule calling on the justices to show cause why the order should not be removed into this Court by certiorari, on the grounds (so far as the objections to the said order consist of objections on account of any omission or mistake in the said order):

"1. That the said order fails to show any jurisdiction in the said Court of Quarter Sessions to make it.

"2. That it does not set out any complaint in writing charging the commission of any offence over which the said Court of Quarter Sessions had jurisdiction.

"3. That the supposed offence charged is not an offence within the meaning of the 79th section of the statute 7 & 8 Vict. c. 84.

"4. That the said order does not specify the nature and particulars of the offence.

"5. That the evidence upon which the said Court of Quarter Sessions acted in making the said order is not set out in the said order.

"6. That the said order contains no adjudication that the said C. R. Badger has committed any offence against the said Act, nor that he has done any specific act alleged to be an offence.

"7. That the said order does not adjudicate that the *said C. R. Badger has received any fee knowing that he was not entitled thereto. [*141

"8. That the said order directs the said C. R. Badger be dismissed from the office of district surveyor of the parish of Lewisham, an office which he has never held."

The rule was obtained on the affidavit of Badger. He deposed that he was, about 10th December, 1854, appointed, and had, till the order in question, acted as, district surveyor of a district in Kent called the district of Lewisham, including, with other places, the parish of Lewisham, but not of the parish of Lewisham alone. That Willoughby, in 1853, built three dwelling-houses of the fourth rate within the meaning of stat. 7 & 8 Vict. c. 84, in the parish of Lewisham. That two, namely, the northern and centre house, were carried up and covered in, within the meaning of the Act, by 22d November, 1853; and the other, or southernmost, by 6th December, 1853, at the latest. That Badger duly surveyed the same. That three fees, 2*l*. 10*s*. each, were, under the Act, due to him as district surveyor for the supervisions of the building of the three houses, and were duly demanded by him of Willoughby, and paid by Willoughby to him, about 12th January, 1854; and that Willoughby did not at any time object to pay them, and had never denied Badger's just title to them. That Willoughby built, to each of the three houses, at the back of them, an attached building

called a privy, which had no internal communication with the house to which it belonged. That the privies were attached buildings distinctly rated under the Acts belonging to the fourth rate; that the privy at the back of the northernmost house, about the time the three houses were carried up, was not fully covered at the top (the deficiency was described as *material), contrary to the regulations of the Act, and was not covered in till after the expiration of twenty-one days after the house to which it was attached had been covered up and carried in; that the other two privies were attached to each other and separated by a party-wall, without internal communication, and the party-wall was not carried up of the thickness required by the Act within twenty-one days after the houses had been covered in within the meaning of the Act. That at various times stated in the affidavit Badger surveyed the privies and complained of the deficiencies to the bricklayer employed. That Badger truly believed that he was, by virtue of the Act, entitled to receive from Willoughby a fee of fifteen shillings for the supervision of each of the privies, and on 27th April, 1854, after the expiration of a month from their completion, delivered to Willoughby an account claiming ten shillings only for each fee of fifteen shillings. That Badger truly believed that it was his duty to direct Willoughby to complete the privies, and that he, Badger, was bound to make a return to the registrar of metropolitan buildings within seven days after the first day of every month, enumerating the number and nature of all the works executed within the previous month within his superintendence, and the fees paid to him for the same, and ought not to make a return of any work as executed until the provisions of the Act respecting the same had been complied with, and ought not to have returned the privies as works executed until they were carried up by a proper party-wall and covering. That, at the hearing of the complaint, which was attended by both Willoughby and Badger, Willoughby said that he would not swear that the party-wall was carried up 8½ inches, or the privy to *the northern house covered in, before 17th February, 1854; and other evidence was deposed to as given at the hearing, including that of Badger himself, confirmatory of the statement that the party-wall and covering were not completed till the February. That Willoughby's counsel did not cross-examine Badger as to the correctness of his statement. That Badger gave in evidence an order, rule, or regulation of Her Majesty's Commissioners of Works and Buildings, dated 5th September, 1845, addressed to the official referees of metropolitan buildings (who, it appeared, had made an award against Badger on a similar question between him and another party, which award the Commissioners had declared to be erroneous), in which privies were described as attached buildings to which the provisions of the Act were applicable. That a lithograph copy of such order had been sent to Badger for his guidance, and that he considered that he "was

*142]

*143]

entitled to claim a fee for the supervision of the erection of a privy attached to a house, though such privy may have been intended to have been built with the house, and may be built before the house to which it is attached is completed, if such privy be not carried up and covered in, within the meaning of the said Act of Parliament, within twenty-one days after the house to which it belongs shall have been covered in." That, at the hearing, Badger's counsel contended that the "Court had no right or authority to find the said complaint well founded, unless the said Court was of opinion that I had no right to the said fees of 10*s.* each, and had received them, or one of them, from the said D. Willoughby, knowing and believing that I had no right to receive the same. And the counsel aforesaid further contended that, on the facts *proved in evidence, I had a full right to demand and receive the said fees, and each of them, under the said Act of Parliament; and that, even if the said Court should think otherwise, that the said Court must come to the conclusion that I had demanded and received the same bonâ fide, believing myself entitled to the same, and that there was no evidence whatever to show that I had received the same, or any of them, knowing that I was not entitled thereto." That, on the decision of the Court "being verbally stated in open court by the" Earl Romney, chairman of the Court, "counsel, on my behalf, applied to the said Court to know whether the said Court had found that I had been guilty of receiving the said fees, or any of them, knowing that I was not entitled thereto, or whether the Court was of opinion that I had received the same, or any of them mistakenly, under a belief that I was entitled to demand and receive the same. That, in answer to this application of counsel on my behalf, the said Charles Earl Romney, as chairman of and on behalf of the said Court, said: 'We find according to the words of the complaint,' or words to that effect."

[*144

In answer, Thomas Moreton Jones, attorney, deposed to some facts respecting Badger's appointment, which became immaterial. That, on the hearing of Willoughby's complaint, "the evidence then given thereon, by and on behalf of the said D. Willoughby, went to prove that the said C. R. Badger, in his capacity of district surveyor for the said parish of Lewisham, had demanded and received three fees, of 10*s.* each, for the supervision of the erection of three privies, built with three houses, by the said D. Willoughby, and also to prove that he, the said C. R. Badger, as such surveyor, was *not entitled, under the provisions of the said Act, to any remuneration whatever in respect of the supervision of the erection of the said privies or any of them."

[*145

In last Trinity Term (June 12th, 1855), *Pashley* showed cause against the rule, and *Bramwell* was heard in support of it. The Court (Lord Campbell, C. J., Coleridge, Erle, and Crompton, Js.) made the rule absolute.

In last Michaelmas Term (November 3d, 1855), *Horn* obtained a rule for quashing the order of Sessions.

In opposition to this rule, Willoughby deposed that, on the hearing, he proved that he built the three privies, attached to the three dwelling-houses, at the same time that he built the dwelling-houses; and that the privies were built and covered in within twenty-one days after the dwelling-houses had been built and covered in within the meaning of the Act. That he also stated to the Court that Badger, in December, 1853, after the dwelling-houses and privies had been so erected and covered in, delivered to him an account claiming three fees, of 2*l.* 2*s.* each, for the supervision of each of the dwelling-houses; and, upon 12th January, 1854, he paid 6*l.* 6*s.* to Badger; and that Badger did not, on that occasion or previously, intimate that any fees would be payable in respect of the privies, or that the privies were at that time in anywise incomplete. That he further stated in evidence to the Court that Badger, in February, 1854, delivered to him an account demanding three fees, of 10*s.* each, in respect of the privies; and that he refused to pay Badger, saying that Badger was not entitled to more than he had already paid: that the same demand was made and refused on several subsequent occasions; and that, in July, 1854, Badger again made the demand, when *Willoughby paid him the 1*l.* 10*s.*, saying at the same time that he was not entitled to it. That Willoughby further stated, in evidence to the Court, that the dwelling-houses and privies were all built under one notice to Badger; and that his supervision of the erection of the dwelling-houses necessarily included the supervision of the erection of the privies. That Willoughby further proved to the Court that (independently of the question whether the privies were covered in within the twenty-one days) the privies were substantially part and parcel of the dwelling-houses, and built expressly for the use of the occupiers; that it was contended, by counsel on behalf of Willoughby, that, inasmuch as the houses would not be complete without the privies, there was no pretence for claiming the 1*l.* 10*s.* That, throughout the hearing, the only question was whether Badger was entitled to any remuneration, above the 6*l.* 6*s.*, in respect to the privies; and no question was raised as to the amount of the fees if he was entitled to them.

*146]

In the same Term (November 14th, 1855),

Pashley, *Deeds*, and *W. Rose* showed cause.—By sect. 104 of stat. 7 & 8 Vict. c. 84, it is enacted: "With regard to every order which shall be made by virtue of or under this Act, and to any other proceeding to be had touching the conviction of any offender against this Act (except," &c., stating exceptions not material here), "that it shall not be lawful for any person to remove such order or other proceeding by certiorari, or any other writ or process whatsoever, into any of her Majesty's Courts of record at Westminster; and every such order and

other proceeding is hereby declared not to be so removable." The question therefore is only whether the magistrates had jurisdiction. The proceeding is *under sect. 79, which enacts: "With regard to every surveyor, so far as relates to the discharge of his duties, [*147 that if any surveyor demand or wilfully receive any higher fee than he shall be entitled to under this Act, or if in his capacity of surveyor he receive a fee for any act or omission in respect of which he is not entitled to receive any remuneration, or if he refuse to refund any fee wrongfully received by him in respect whereof the official referees shall have made an order to that effect, or if at any time he wilfully neglect his duty, or behave himself negligently or unfaithfully in the discharge thereof, then and in every or any such case it shall be lawful for any person to present a complaint in writing under his hand to the lord mayor and aldermen of the city of London, or the Court of Quarter Sessions having jurisdiction over the district for which such surveyor shall act for the time being, at any sessions of the peace, quarter or general, either original, intermediate, or adjourned, and which complaint shall set forth the nature and particulars of the offence charged by the complaint against any such surveyor." The section then directs the mode of proceeding to a hearing, and that, "if, upon the hearing of the complainant and of the surveyor, and the evidence respectively produced by or for them, it shall appear unto the said lord mayor," &c., "or Court of Sessions, as the case may be, that such complaint in whole or in part is well-founded, then it shall be lawful for the said lord mayor," &c., "or the said Court of Quarter Sessions, as the case may be, and they are hereby respectively required, either to fine such surveyor in such sum of money not exceeding 50*l.* as they shall think fit, or to discharge him forthwith from his said office; and that if for any such cause such survey or *be discharged, he shall be incapa- [*148 ble of being again appointed a surveyor for the purposes of this Act." One objection is, that there are no such justices as those described in the heading of this complaint, but that there is a single commission for the whole county of Kent. But, the complaint being rightly presented, the heading is superfluous. Then it is said that the appointment and office of the surveyor are wrongly described, inasmuch as he was not surveyor of the parish of Lewisham, but of a district comprehending the parish and other places. [This objection was given up by the other side.] Then as to the substance of the complaint. The words of sect. 79 are sufficiently followed. Schedule (L.) prescribes the fees to be taken by the surveyor. For a fourth rate house of the first class, a dwelling-house, not containing more than two stories, 1*l.* 10*s.* is to be charged: and "for every attached or detached building, distinctly rated (except any such attached or detached building built at the same time as the building to which it belongs, and carried up and covered in within twenty-one days after such building shall have been covered in

within the meaning of this Act), such fee as is hereby imposed in respect of additions to or alterations of buildings of the rate to which such attached or detached buildings shall belong:" and the addition, in the case of a fourth-rate building, is 15*s*. or 10*s*., according as it does or does not contain more than two stories. Schedule (C.) defines the different charges and rates; and, by Part vii. of the same schedule, the attached building ("except greenhouses, vineries, aviaries, or such like buildings") is to be deemed as a building of the rate to which it would belong if built separately. Now these privies, being alleged to be carried up and covered in *149] *within the twenty-one days, fall within the exception of Schedule (L.); and the additional fee is not authorized. The surveyor, it is true, disputes the fact: but that question is for the magistrates; and this Court cannot discuss the evidence on a point of jurisdiction. It is objected that the complaint does not show that the fees are taken corruptly, or with knowledge that they were not demandable. But that is implied in the word "wilfully:" if not, sect. 79, which uses no other word, does not make corruption or knowledge an essential ingredient of the offence: and the question, whether the ingredients of the offence, whatever they are, were proved in fact, is one of evidence, not of jurisdiction. It is true that an indictment is not always sufficient because it pursues the language of the statute on which it is founded: but here the essential part of the enactment is embodied: and on a summary conviction it is enough to describe the offence in the words of the statute; Rex *v.* Chandler, 1 Ld. Raym. 581. This, however, is not a conviction, but an order, in which it is not necessary to set out the evidence; Rex *v.* Lloyd, 2 Stra. 996. [COLERIDGE, J.—The complaint sets up an offence in respect of doing what, in some cases, the party was entitled to do: the offence would be committed if either too large a fee were received, or a fee where no fee at all is payable.] The complaint states facts within the definition of the offence. The surveyor is bound to know the law, and commits an offence by ignorantly transgressing it. As to the formal part of the order, stat. 12 & 13 Vict. c. 45, s. 7, gives the power of amendment to this Court. But no amend- *150] ment is necessary. The complaint, it is *true, does not expressly state that no fees were payable in respect of the privies, nor that 10*s*. was too high a fee; but it does state that Badger received the fees, "not being entitled thereto;" and, upon the other statements of the complaint, it appears that he could not be entitled to any additional fee at all in respect of the privies. The order finds the complaint well founded.

Bramwell, *Horn*, and *F. Russell*, contrà.—The justices had no jurisdiction if the complaint, on the face of it, fails to bring the case within the statute, or if it appears that, in fact, the case heard was not a case within the Act, so as to give the justices jurisdiction to commence the inquiry; Regina *v.* Bolton, 1 Q. B. 66 (E. C. L. R. vol. 41). First, as

to the language of the complaint. That the surveyor may receive money to which he is not entitled, and commit no offence if, upon being ordered by the official referees to refund it, he obeys, is manifest from sect. 79, which makes disobedience of such an order, made under sect. 77, an offence distinct from that of demanding or wilfully receiving a higher fee than he is entitled to, or receiving a fee to which he is not entitled at all. The demanding and receiving, therefore, must, to be criminal, be a demanding and receiving corruptly, or with knowledge that the claim is unfounded. [COLERIDGE, J.—Suppose the surveyor receive a legal fee, and afterwards, forgetting that he has received it, receive it again: what remedy has the statute provided?] The Legislature probably did not think it worth while to provide for the case of a man paying a debt twice over: the clause in sect. 79, on which the complainant relies, is directed *against extortion. Now the word "wilfully" does not [*151 bring the complaint under this. In indictments for extortion the word "extorsively" is used; Cr. Cir. Comp. 220, 9th ed.; 2 Chitt. Cr. L. 295—300; or "fraudulently," as in Rex *v.* Dobson, 7 East, 218. "Wilfully" would clearly not be enough upon an indictment against a sheriff, under stat. 3 G. 1, c. 15, s. 13, for taking excessive fees, or against a coroner, under stat. 25 G. 2, c. 29, s. 6. "Wilfully" is only "*voluntariè*." Stat. 31 G. 2, c. 10, s. 24, in describing the offence of personating a seaman, adds "and knowingly" to "wilfully". It is suggested that the surveyor must be taken to have knowledge: but he is to act on notice from the builder; sect. 13, 68, &c. There clearly are some cases in which the surveyor would be entitled to a fee for the separate inspection of the privies; what is there in the body of the complaint to show that he has done other than wilfully, that is, not accidentally, receive such fee? [WIGHTMAN, J.—Suppose he is charged with wilfully receiving a fee in respect of surveying an aviary, and corruption or knowledge is not alleged.] If, as may perhaps be the law, it is impossible that in such a case a fee should be due at all, it is possible that it would not be allowed to him to allege ignorance, and knowledge would be implied. But this is a very different case. [Lord CAMPBELL, C. J.—Here sect. 79 says: "which complaint shall set forth the nature and particulars of the offence charged by the complainant against any such surveyor." Is not that done?] At the least the offence should be described more particularly. Under the Pilot Act, 6 G. 4, c. 125, s. 70, a commitment for *continuing in charge of a vessel with- [*152 out being licensed is bad if it be not alleged that a licensed pilot had offered, to or in presence of the defendant, to take the charge, though the enactment prescribes no such condition; Regina *v.* Chaney, 6 Dowl. P. C. 281. A breach of duty should appear: sect. 79 speaks of the surveyor's "duty." There can be no difficulty in describing precisely what is claimed, as sect. 77 prescribes the surveyor's fees, and requires an account to be delivered by the surveyor before payment,

which has been done here. But the complaint does not even show that the fee was claimed for surveying: it says only "in respect of each of the said privies." [Lord CAMPBELL, C. J.—Surely it is a reasonable intendment that the claim was in respect of surveying them.] Intendment will not be made to support jurisdiction. Suppose there were an indictment for obtaining the money under false pretences; would it be enough to lay it as obtained "in respect of the privies?" Lancaster *v.* Greaves, 9 B. & C. 628 (E. C. L. R. vol. 17), shows the necessity of stating facts to raise the jurisdiction unequivocally: and authorities to the same effect are collected in Paley's Law and Practice of Summary Convictions, p. 88, &c., 3d ed. (p. 160, 4th ed.). The complaint adds, that "so" the complainant complains that Badger did, "in manner and form aforesaid, unlawfully demand and receive a fee to which he was not entitled:" but, unless what has gone before shows illegality, this will not aid: if it could, it would be enough simply to say that he received a fee to which he was not entitled. The fee might, for anything that the complaint shows, have been received without title and
*153] unlawfully, if the *surveyor's work had not "been done in every respect agreeably to the directions of this Act," by the proviso in sect. 77: but in that case the only course would have been for the official referees to order a refunding, and, if the order were not obeyed, to complain of the disobedience. In case of doubt, the determination is for the official referees, by sect. 82. The order, even if it be taken to affirm the complaint modo et formâ (which may be disputed), at all events is open to the same objections as the complaint. But, further: on the facts, as they appear from the affidavits, no complaint or order could be framed bringing the case within sect. 79, so as to give jurisdiction to the magistrates to commence the inquiry. There is no suggestion that the fees have not been received under the belief that they were due, nor anything to show that they were not so received in fact. Primâ facie, under schedule (C.) part vii., attached buildings are to be treated as buildings of the rate to which they would belong if built separately, except greenhouses, vineries, aviaries, or such like buildings. [Lord CAMPBELL, C. J.—Were not the magistrates acting within their jurisdiction in deciding whether the facts came within the enactment or not?] Further, the complaint is wrongly addressed; there are no such magistrates as those described. Lastly, it may be questioned whether sect. 104, which takes away the certiorari, be applicable to the orders of quarter sessions, except those which are made upon appeals "touching the conviction of any offender against this Act," that is, appeals against summary convictions under sects. 103, 105. It would be reasonable to restrict sect. 104 to this class of orders, because there the original judgment has been already once reviewed; whereas, when the
*154] proceeding commences *in quarter sessions, there will be no means of reviewing the judgment if the section be applicable.

Pashley was heard in reply. *Cur. adv. vult.*

On this day, there being a difference of opinion on the Bench, the following judgments were delivered seriatim.

ERLE, J.—As the certiorari is taken away in respect of all orders made under stat. 7 & 8 Vict. c. 84, by sect. 104, the question for decision is, Whether the order now brought up was made under that statute, and so within the jurisdiction given thereby to the Sessions by sect. 79. If it was, the certiorari is to be quashed; if it was not, the order is to be quashed.

In general, if the proceedings are regular, the jurisdiction to make the order depends on the jurisdiction to commence the inquiry; and, accordingly, in this case the governing question seems to be, Whether the complaint charges an offence within the 79th section above mentioned. In examining the complaint, I give full effect to the words in their ordinary meaning; and, although the instrument wants precision, I endeavour to take it in the same sense in which it was understood by the Sessions.

The material allegations of the complaint are, that three houses of the fourth rate were covered in on the 29th November, and that three privies attached thereto were carried up and covered in within twenty-one days after that day; and that the defendant, as surveyor, on 7th December, delivered an account claiming three *fees of two guineas each for the three houses, which were paid; and, on the 9th February, [*155 delivered another account claiming three fees of 10*s.* each in respect of the privies, and did demand and wilfully receive them, not being entitled thereto under the Act. From the complaint I gather that the surveyor claimed and received the fees in respect of the privies on the assumption of fact that they were not carried up and covered in within the twenty-one days; and that the builder, the complainant, meant to contend, and convinced the Sessions, that the surveyor was mistaken in that assumption of fact, and that the privies were carried up and covered in within the twenty-one days. Such appears to be the meaning of the complaint, and also of the order: and so I understood the counsel in support of the order to contend. But, if it is contended that the complaint has another meaning besides this, namely, that the surveyor demanded the fees in respect of privies assumed by him to have been covered in within the twenty-one days, then the proceedings are defectively drawn up, and either are bad on account of informality, or the informality justifies us in looking to the affidavits to see which is the true meaning; see Regina v. Bolton, 1 Q. B. 72 (E. C. L. R. vol. 41). And in the affidavits we find that the true meaning is that first above mentioned: and thus the question is raised, Whether a surveyor bonâ fide claiming a fee on an assumption of fact which entitles him thereto, and receiving it on that assumption, is guilty of an offence within the 79th section. If he is found to have been mistaken as to the fact he assumed, I think not:

*156] and I consider that such a *question of fact, so raised, was within the province of the civil powers created by the statute, and not within the criminal jurisdiction conferred on the Sessions by sect. 79. The preamble of the statute recites the diversity of practice among the officers appointed under former building Acts, and the expediency of regulating the office of surveyor, and of providing for the appointment of officers who should superintend the execution of this Act. The statute afterwards defines the duties of the surveyor, and gives him the fees comprised in schedule (L.), and, among the rest, a fee for attached buildings, except those carried up and covered in within twenty-one days after the houses to which they are attached are covered in. The statute also creates official referees, who may settle disputes between the surveyor and other parties, with a further resort on certain occasions by way of appeal to the commissioners and registrar. By these officers the civil powers under the act are to be exercised, and lawful disputes determined. Also, by sect. 77, enabling the surveyor to recover his fees before a justice, the party disputing the right may refuse to pay, and may take the judgment of a justice as to his liability by appearing to resist a distress warrant; and also he may, at any time after payment, appeal to the official referees, who may order the surveyor to refund the fee if they think it wrongfully received. In either of these ways, the builder may obtain redress if the fee claimed is not due. But, beyond the civil powers for settling disputed questions of right, the statute, by sect. 79, creates a criminal jurisdiction over intentional offences. That this section is directed against offences only is clear, because it requires the complaint in all cases to state the nature

*157] and *particulars of the *offence* complained of, and because the sentence must be penal, either fine, or discharge from office with perpetual incapacity in future; and because the description of each offence involves a wilful violation of the law, and does not include a bonâ fide mistake. These offences are extortion, disobedience to the official referees in not refunding, wilful neglect of duty, and unfaithful discharge of duty. As to all the offences except extortion, the description is unequivocal: as to extortion, two kinds are provided against, viz., taking too high a fee, and taking a fee where none is given by law. It is in the description of these two offences that the language is uncertain. The words are: "If any surveyor demand or wilfully receive any higher fee than he shall be entitled to under this Act, or if in his capacity of surveyor he receive a fee for any act or omission in respect of which he is not entitled to receive any remuneration." Do these words extend only to wilful extortion, or do they comprise bonâ fide mistakes, either as to the amount of the fee or as to the fact on which the right to the fee depends? I think the enactment is directed against wilful extortion only, and does not include an innocent mistake. The context makes this probable; and the words themselves, closely

considered, indicate that meaning. Every matter that may be the subject of a complaint within this section must be an offence; and an offence implies intention in the offender. The description of the offence of demanding a higher fee than the surveyor is entitled to applies to the case of a surveyor professing to claim the fee given by schedule (L.) upon the facts there entitling to a fee, and increasing the amount: for instance, the fee for a fourth-rate house is 2*l.* 2*s.*; and, if he demanded 3*l.* 3*s.*, *he would be guilty: if he had read schedule (L.) he would know he was demanding more than was due; and it can scarcely be supposed that a surveyor would act who had not read schedule (L.). And the offence of *wilfully* receiving a higher fee than he is entitled to applies in terms to the intentional wrong: at least I would construe "wilfully" here to be equivalent to "knowingly and fraudulently" so doing. If the offence in the first clause, relating to overcharge, means intentional extortion, it is probable that the offence in the second clause relating to demands of fees where there was no right to any fee would be analogous, and apply to cases where the demand was knowingly made without a colour of right. The Legislature may well have supposed that many persons would be ignorant of the statute, and would trust to the surveyor, and so would be liable to be cheated by him. It has, therefore, put a severe penalty on a surveyor who should take such an advantage. By so construing the Act, [*158

all parts have a more reasonable and consistent effect than they have with the other construction: and I adverted to the facts in the affidavits merely to exemplify the effects of the two constructions. The question of fact raised, between the parties below, as to the covering in of the privy, was, whether a privy having a slate cistern on the top, within the twenty-one days was covered in, while an opening twelve inches wide was left till after the twenty-one days, and then closed: and the question of fact raised as to the carrying up the other privies was, whether they were carried up while the partition wall between them was only four inches thick, which ought, by the Building Act, to be eight inches thick, and which, after the twenty-one days, was made eight *inches thick. These questions are more fit for an architectural than a criminal tribunal: and the surveyor appears to have good reason for contending that such questions were appropriated by the statute to the official referees and commissioners. He also seems to have good reason for contending that he ought not to be convicted of an offence under the criminal tribunal, and degraded and incapacitated for life, for taking a fee which he correctly believed to be his right, and which the civil tribunals under the statute decide him to be entitled to. If the intention of the Legislature had been as supposed by the builder, the enactment should have been: "If the surveyor shall receive any amount by way of fee to which he shall not be entitled he shall be liable to fine and discharge." But the words of the section are not so wide; [*159

and I think that they do not extend to a receipt of a fee under a bonâ fide assumption of fact entitling thereto, although the assumption may be found by the tribunal to have been a mistake.

It follows that the order of Sessions was without jurisdiction, and must be quashed.

COLERIDGE, J.—This was a rule to quash an order of justices made at the quarter sessions for the county of Kent, for the removal of the defendant from his office of a district surveyor, under stat. 7 & 8 Vict. c. 84, the order having been removed into this court by certiorari. By sect. 104, all orders made by virtue of or under the Act are made irremovable by certiorari: and the inquiry therefore is now limited to the consideration whether, in the making it, the justices have or have not acted within their jurisdiction.

*160] *The order itself is so short and general in its terms that nothing can be gathered from it, but that the Court had heard a complaint which had been made by one David Willoughby against the defendant, and which set forth the nature and particulars of the offence charged thereby, and which alleged that the defendant, in his capacity of surveyor, had demanded and wilfully received a fee to which he was not entitled under the Act: that the justices had heard counsel on both sides, and the defendant himself, and the evidence produced; and that it appeared to the Court that the complaint was well founded, and that the Court discharged the defendant from his office forthwith.

The complaint, therefore, thus shortly referred to, must be considered as embodied in the order: and we must, in the first instance, refer to it, to see what it was which the Sessions in fact dealt with. Its material facts are the following: That the complainant did, in 1853, erect and build three dwelling-houses of the fourth rate adjoining each other; that these were carried up and covered in by the 29th November, 1853; that three privies attached to the back of and belonging to the said dwelling-houses, being one to each house, were each and all of them built and carried up at the same time with the dwelling-houses, and were covered in by the 2d December, 1853, and within twenty-one days after the dwelling-houses had been covered in; that, in the month of December, 1853, the defendant, as such surveyor, delivered to the complainant an account claiming a fee of two guineas *in respect of each of the said dwelling-houses*, as being due to him as such surveyor, which were paid on the 12th January, 1854; that, in the month of February,

*161] 1854, the said defendant, as *such surveyor as aforesaid, delivered another account to the complainant, claiming a fee of ten shillings as due to him as such surveyor *in respect of each of the said privies*, and demanded payment thereof, and did, on the 14th July, 1854, wilfully receive the same, he not being entitled thereto: and then the complaint concludes by inferring from the facts stated in these allegations, that "so" the defendant "did, on the day and year last afore-

said, in manner and form aforesaid, unlawfully demand and receive a fee to which he was not entitled under the said Act."

The substance of the complaint appears then to be that, whereas the dwelling-houses and the privies attached to them respectively were carried up and covered in, the latter within twenty-one days of the former, and whereas in respect of the dwelling-houses the defendant had claimed as surveyor, and been paid in January three fees of two guineas each, yet, in the month of February, he had claimed, as surveyor, and been paid in July, three fees of ten shillings each in respect of the three privies. Nothing is said as to the work done on either occasion in respect of which the fees were demanded: and, assuming that the dwelling-houses and privies are under the circumstances stated to be considered as parts of the same buildings respectively, unless it can be maintained that under no circumstances and in consideration of no work done a second fee could rightly become payable after one demanded and paid in respect of the same buildings, it is clear that this statement is defective, and does not disclose any specific offence. But this cannot be maintained; for, to go no further than the same schedule (L.) of the statute under which the first fee of two guineas was claimed and paid, *it appears that for certain alterations or additions made to buildings under certain conditions *at any time*, however short, after the roof covered in, a fee may become payable. It is quite consistent with [*162 every allegation in this complaint, that the fee here claimed was of right payable for some such alteration or addition to these privies.

If, therefore, the 104th section of the statute, taking away the certiorari, were out of the way, there can be no doubt, I think, that we should hold this order and complaint insufficient, and quash the former. But, where the certiorari is taken away, the Legislature in effect constitutes the inferior tribunal sole judge both of the form and the substance, the statement of the charge and the fact to be proved, subject to no appeal to any higher Court: and therefore, when any proceeding is still brought before us on the ground that it has taken place in excess of jurisdiction, and the language either of the complaint or the order is relied on to establish that excess, I conceive it to be our duty to construe that language very liberally, looking to its substantial sufficiency rather than its technical accuracy, if, after reference to the affidavits which may be used as well to show as to disprove jurisdiction, it shall appear that the Court below were really engaged upon the trial of a question which was within their competency to try. And the spirit in which we are to conduct such examination must be the same, whether we are satisfied or dissatisfied with the conclusion in fact at which they have arrived. For with that conclusion we have nothing to do, the Legislature having thought fit to make them judges, without appeal upon the merits. And the only ground upon which we are at liberty to exa-

*163] mine the proceedings at all is the necessity of doing so in *order to ascertain whether the Court below was acting within its jurisdiction.

Now, without going into the affidavits minutely in detail, it appears that, on the one hand, the complainant Willoughby's contention was that he had built and completed privies attached to his three houses of such a character and within such a period of time from the carrying up and covering in of the houses that the survey of the houses included the survey of the privies; that there was no right to make a separate survey of them, or to demand a fee for it; and therefore that to demand and receive a fee for such survey was to commit, within the 79th section of the Act, the offence of receiving a fee for an act in respect of which he was not entitled to receive any remuneration. On the other hand, the case of the surveyor was that, when he surveyed the houses, the privies were not in such a state as complied with the Act, one of them not being properly covered in, and the party-wall between the other two being of less than the requisite thickness; that these defects were the subject of complaint on his part, and were not removed till two months after the first survey; so that he was entitled, under the Act, to a separate fee for the final survey of them which he made; and that, as to character, these privies were not such as the complainant represented, but that they were buildings distinctly rated.

It is clear that this was the question which the parties came to try at Sessions, that which the Sessions heard, and on which they decided: and, although the complaint does not satisfactorily and conclusively raise this question, yet I am not prepared to say that it is so imperfect

*164] a statement that, the Sessions having treated *it as sufficient and decided on it, we can on the ground of excess of jurisdiction quash their order.

But this assumes that the question so raised, and taking the sufficiency of the statement for granted, was within the jurisdiction of the Sessions. For, if it was not, then it is perfectly clear that the order must be quashed. This will depend on the construction of the 79th sect. of stat. 7 & 8 Vict. c. 84. This section is enacted "with regard to every surveyor, so far as relates to the discharge of his duties:" and it subjects him, upon certain complaints, to fine not exceeding 50*l.*, or to discharge from his office, attended, in the latter case, by perpetual incapacity of being again appointed surveyor. The complaints which may lead to these results are specified thus; 1. if he shall "demand or wilfully receive any higher fee than he shall be entitled to under this Act;" 2. "or if in his capacity of surveyor he receive a fee for any act or omission in respect of which he is not entitled to receive any remuneration;" or, 3. "if he refuse to refund any fee wrongfully received by him in respect whereof the official referees shall have made an order to that

effect;" or, 4. "if at any time he wilfully neglect his duty, or behave himself negligently or unfaithfully in the discharge thereof."

It is clear that both the complaint and the order intended to bring the defendant's case under the second head: although it is remarkable that both state it simply as the demanding and receiving a fee to which he was not entitled. The question then is, what the Act intends by receiving a fee for any act or omission in respect of which he is not entitled to receive any remuneration. And it seems to me that the words themselves, as well as the context, show that the intention *was, not the receiving a fee for something not done, or not [*165 omitted to be done, for which, if done or omitted, remuneration would be due, but the receiving a fee for an act or omission for which, even if done or omitted as alleged, the Act gave no remuneration. The former would constantly depend on disputed facts, as to which the surveyor might make the claim bonâ fide, and yet be in error: to punish him in such case by dismissal and perpetual incapacity for office would be unjust in the extreme; and the Act clearly provided another mode of disposing of such questions by sect. 77; on refusal to pay, the surveyor may bring the party before the justice of the peace, and before him the fact on which the lawfulness of such claim rests may be contested; or, if the party has paid on demand, and yet disputes the lawfulness of the claim, he may apply to the official referees, who may, if they think the claim not made out, direct the surveyor to refund the money: and, if they so decide, and the surveyor refuse to refund, he brings himself within the third class of offences provided for by the 79th section.

The introduction of this third class shows that the cases over which the official referees have jurisdiction were present to the mind of the framers of this section at the time of framing it; and it is worthy of remark that, although the word "wilfully" is introduced in the first and fourth classes of offences, in order to constitute them, it is omitted in the second and third classes, and, as it seems to me, for an obvious reason, namely, that it was in each of these unnecessary. Where a surveyor refused to refund money which the official referees had ordered him to refund, the refusal could not be in ignorance or bonâ fide: so also, the Act distinctly pointing *out in which cases a fee was [*166 lawfully claimable, the surveyor was bound to know them; and, if he claimed in other cases, the claim could not be taken to be made bonâ fide. Further, I think it unreasonable to suppose that the Legislature has provided for the same case by sect. 79 which was already provided for by sect. 77; and it seems clear to me that such a case as the complainant here insists upon might have been taken by him either before the justice of the peace or the official referees.

I come to the conclusion, therefore, on these grounds, that the jurisdiction of the Sessions is confined to the case where the surveyor has

received a fee wholly unauthorized by the statute, even if he has done or omitted to do the act on the doing or omitting to do which he founds his claim to receive it.

But it is obvious that this was not the case which the Sessions in the present instance dealt with. Here it was purely a dispute upon facts. A fee is given by the Act under certain circumstances; it is not given under certain other excepted circumstances: the complainant alleged that the facts brought him within the exception; he said the privies were carried up and covered in within twenty-one days after the principal buildings had been covered in; the surveyor alleged that they were not, by reason of aperture in the roof and insufficiency of the party-wall, carried up and covered in for more than a month after that time. But he made no claim out of the Act of Parliament. If he was right in his facts, the Act had entitled him to remuneration for his survey.

I think therefore that, upon a careful consideration of the statute and examination of the facts, the Sessions *had no jurisdiction; *167] and consequently that, in consistence with Regina *v.* Bolton, 1 Q. B. 66 (E. C. L. R. vol. 41), and the whole course of our decisions, their order should be quashed.

My brother Wightman agrees with my brother Erle and myself.

Lord CAMPBELL, C. J. (whose judgment was read by Coleridge J.)—I am of opinion that in this case the certiorari has improvidently issued, and that it ought to be quashed.

The justices in making the order professed, and bonâ fide meant, to proceed under stat. 7 & 8 Vict. c. 84; and sect. 104 of that statute enacts, (his Lordship then read the section.) Thus, where there is a proceeding before justices under the Act, the Legislature has intrusted them with the final power of deciding, thinking that, although this course may in particular cases subject individuals to hardship, it is upon the whole more conducive to the public good than, by a right of appeal, to prolong litigation and to afford an opportunity of taking technical objections for the purpose of defeating substantial justice. If an order has been made by the quarter sessions, under colour of the Act, without jurisdiction, we are still bound to grant a certiorari, and to quash the order: but it lies upon the defendant to show clearly that they did proceed without jurisdiction; and it is not enough for him to show that, having jurisdiction, they pronounced an erroneous judgment.

The leading case upon the distinction between excess of jurisdiction and erroneous judgment is Regina *v.* Bolton; although it must be re- *168] membered that there *the certiorari had not been taken away. The Court there said: "All we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits

be unwise or unjust, on these grounds we cannot reverse it." "Where the charge laid before the magistrate, as stated in the information, does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the statute would not avail to give him jurisdiction." "Or if, the charge being really insufficient, he had misstated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits what the real charge was, and, that appearing to have been insufficient, we should quash the conviction." In the present case there is no suggestion of any misstatement in drawing up the proceedings. I am not aware of any ground upon which the affidavits offered to us can be received; and I do not think myself at liberty to enter into the merits of the charge or of the defence. The order itself being unobjectionable on the face of it, we have only, as it seems to me, to consider whether the charge laid before the justices, as stated in the complaint, amounts in law to an offence over which the statute gives them jurisdiction.

Now, by sect. 79, it is enacted: "that if any surveyor demand or wilfully receive any higher fee than he shall be entitled to under this Act, or *if in his capacity of surveyor* he receive a fee for any *act* or omission *in respect of which he is not entitled to receive any* *re-
muneration," in "any such case it shall be lawful for any person [*169 to present a complaint in writing" to certain justices, "which complaint shall set forth the nature and particulars of the offence charged by the complainant against any such surveyor." The subsequent procedure (which has been followed in this case) is then prescribed; and the justices are empowered for such offence to impose a fine upon the surveyor not exceeding 50*l.*, or to discharge him from his office. Thus the surveyor is guilty of an offence if, in his capacity of surveyor, he wilfully receives a fee for any act in respect of which he is not entitled to receive any remuneration; and the complaint is merely to set forth the nature and particulars of the offence charged.

I am of opinion that in the present case the complaint does sufficiently charge this offence, and does sufficiently set forth the nature and the particulars of the offence charged. If this be so, the justices unquestionably had jurisdiction to hear it.

I entirely concur in the position that the complaint must charge an offence over which the justices had jurisdiction, and that it would not charge such an offence if it merely alleged that the surveyor had, through a mistake of fact, demanded and received a fee to which he was not entitled, and which he might be called upon to refund. Such a receipt of money might be made the foundation of another proceeding under the Act, but not of a proceeding under sect. 79. This section applies only to "offences;" and these offences must have been committed "wilfully" or malo animo.

But, looking to this complaint, I must say that, instead of stating a receipt of money by mistake, it charges, and if the facts which it alleges *170] be true clearly *proves, that the surveyor wilfully demanded and received a fee for an act in respect of which he was not entitled to receive any remuneration. The complaint is long and circumstantial, giving the whole history of the three dwelling-houses, and the three privies: and, if the three privies were built and carried up at the same time with the three dwelling-houses, and were covered in within twenty-one days after the dwelling-houses had been covered in, it is quite clear that under schedule (L.) the surveyor was not entitled to any remuneration in respect of the privies after he had received the 6*l.* 6*s.* in respect of the dwelling-houses. But the complaint avers that he afterwards claimed a fee of 10*s.* as due to him as such surveyor in respect of each of the said privies, making together 1*l.* 10*s.*, and did demand of the complainant payment of the said last-mentioned sum, and did, on the 4th day of July, 1854, in his capacity of surveyor as aforesaid, *wilfully* receive the same from this complainant, he the said C. Badger not being entitled thereto under the said Act. The act done was surveying the three privies. For this act, according to the statement of the facts, he was not entitled to any remuneration. The fee which he demanded and received was wholly unauthorized by the statute. The demand and receipt of the 1*l.* 10*s.*, instead of being represented by the complaint to have been under an honest mistake, must, I think, be here considered to be charged as intentional and fraudulent, and with knowledge that no remuneration was due beyond what had been received. The technicalities of an indictment, or even of an information under a penal statute, are not required in the complaint. It is only to set forth the nature and particulars of the offence charged: and, after reading *171] *over this complaint, the defendant must have been well aware of what he had to answer, and might have come fully prepared to make his defence. He might have shown, if the fact was so, that he had demanded and received the 1*l.* 10*s.* through a mistaken apprehension that the privies had been constructed or completed after the twenty-one days, so as to entitle him to the additional fees, or under any other circumstances which rebut the charge that in demanding and receiving the money he acted "wilfully." The word "wilfully" is used in the 79th section of the Act with respect to receiving any higher fee than the surveyor is entitled to, in a sense denoting *evil intention;* and such is the common use of the word in the English language. Thus Milton:(*a*) "Thou to me Art all things under Heaven, all places thou, Who for my *wilful* crime art banished hence:" and Hooker says: "So full of *wilfulness* and self-liking is our nature."(*b*)

Even if there were an informality in the proceeding in this case, the

(*a*) Par. L. XII. 617.
(*b*) Preface to Ecc. Pol. Ch. VI. s. [3].

certiorari being taken away, we cannot for that informality quash the conviction: the very object of the Legislature in taking away the certiorari was to prevent informality from being available to vitiate the order. But the whole proceeding upon the face of it appears to me to be regular.

At the bar, a strong appeal was made to our compassion: and we were told that according to the affidavits the defendant has been very cruelly used, and has been deprived of his office and rendered incapable of being again appointed a surveyor under the Act, although guilty of no offence. I again recur to the language of *this Court in Regina v. Bolton, 1 Q. B. 76 (E. C. L. R. vol. 41), and "forbear to express any opinion on that which is not before us, the propriety of the conclusion drawn from the evidence by the magistrates: they and they alone were the competent authority to draw it; and we must not constitute ourselves into a Court of appeal where the statute does not make us such, because it has constituted no other. It is of much more importance to hold the rule of law straight than, from a feeling of the supposed hardship of any particular decision, to interpose relief at the expense of introducing a precedent full of inconvenience and uncertainty in the decision of future cases." [*172 Order quashed.

ROBERT THOMPSON, JOSEPH LOWES THOMPSON, and JOHN THOMPSON *v.* THOMAS DUCK HOPPER. *Feb.* 23.

There is not in general an implied warranty of seaworthiness in a time policy of assurance.

Per Lord Campbell, C. J., Coleridge, and Wightman, Js., dissentiente Erle, J.: There is not an implied warranty of seaworthiness in a time policy of assurance, though, at the time of the making of the policy, the ship, being an outward bound ship, and chartered for a foreign port, is lying in a British port where the owner resides.

Per Lord Campbell, C. J., Coleridge and Wightman, Js., dissentiente Erle, J.: In such a case, it constitutes no defence, to a declaration alleging loss by perils of the sea, that the plaintiff, the shipowner, knowingly, wilfully, wrongfully, and improperly sent the ship loaded out to sea in an unseaworthy state, and when she was not in a fit and proper condition safely to go to sea.

Per Curiam: A good defence is shown by a plea alleging that the plaintiff, knowingly, wilfully, wrongfully, and improperly sent the ship to sea at a time when it was dangerous to go to sea in the state and condition in which she then was, and wrongfully and improperly caused and permitted the ship to be and remain on the high seas near to the sea shore, for a great length of time, in the state and condition aforesaid, and without a master, and without a proper crew to manage and navigate her on her said voyage; during which time the ship, *by reason of the premises*, was wrecked.

THE first count of the declaration alleged that, at the time of the making of the policy of insurance in this count after mentioned, plaintiffs, defendant, and *divers other persons, were, and still are, members of an association called The Equitable Marine Insurance Association. And thereupon plaintiffs caused to be made a certain policy of assurance, purporting thereby, and containing therein, that plaintiffs, as well in their own name as for and in the name and [*173

names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance, and cause themselves, and them, and every of them, to be insured, lost or not lost, "at and from the meridian of the 21st day of October, in the year of our Lord 1854, to and with the meridian of the 1st day of March, in the year of our Lord 1855, upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the Mary Graham. And it was by the said policy declared that it should be lawful for the said ship to proceed and sail to and touch and stay at any ports or places whatsoever, without prejudice to the said insurance." And it was further declared that the ship by agreement was valued at 5000*l.* "And that, touching the adventures and perils which the assurers were contented to bear and did take upon themselves, they were of the seas," &c., "and all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said ship or any part thereof." That a memorandum was subscribed, whereby it was declared and agreed that certain annexed regulations should form part of the policy. The declaration set out the first ten of the regulations. The first was: "That the members of this Association shall severally and respectively, not jointly or in partnership, nor the one for the other of them, but each only in his own name,

*174] *insure each others' ships or shares of ships from noon of the 1st day of March, 1854, or from the date of entry of each vessel, respectively, until noon of the 1st day of March then next; and from that time until the 1st day of March in the next succeeding year, and so on from year to year, unless notice to the contrary be given as hereinafter mentioned, against all losses, perils, and damages, of whatever nature or kind soever, which may be sustained or received by their respective ships, or caused or done by them to other ships or craft, except when on the voyages in the trades, or under the circumstances hereinafter particularly excepted." (Nothing turned upon any of the other nine regulations.) That defendant and the other members of the Association subscribed the policy for 1000*l.*, every member to bear his equal proportion according to the sums mutually insured therein. Allegations of mutual promises, and of the interest of plaintiffs. That afterwards, and during the period for which the ship was insured, that is to say, between 21st of October, 1854, and 1st March, 1855, the ship and her body, &c., were, by the force and violence of the winds and waves, and by the perils of the seas, broken and wrecked, and totally lost. That, at the time of the loss, she remained and was insured in the sum of 1000*l.* by the Association for the period and on the terms in the policy and regulations mentioned. General allegation of performance necessary to entitle plaintiffs, &c.; and allegations bringing the case within the regulations. That the defendant's proportion of the 1000*l.* was 50*l.* Breach: non-payment.

The second count stated that plaintiff, defendant, and others, were members of another association called The Protector Insurance Association; and alleged a similar *policy of assurance, stating the period of insurance as at and from the meridian of 25th October, 1854, to and with the meridian of 20th March, 1855, with regulations varying in some particulars from those of the other Association, but not in any point material to the present case. The period of mutual assurance named in the regulations was from noon of 20th March, 1854, or the date of entry of each vessel, until noon of 20th March then next, and from that time until 20th March, in the next succeeding year, and so on, &c. The defendant's proportion was charged at 100*l*. In other respects the counts corresponded, so far as is material to the question raised. [*175

Pleas. 1. To the first count: That, at the time when the said policy was made and effected, and thenceforth down to the time when the said ship was sent to sea as hereinafter mentioned, the said ship was an outward bound ship, lying in a British port, to wit, the port of Sunderland; and at which place the plaintiffs also resided at the time of making the said policy, and at the time of their sending the said ship to sea, as hereinafter mentioned. That plaintiffs had, shortly before the making of the said policy, agreed with one Thomas Gillespy that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, should with all convenient speed, at Sunderland, load from the factors of the T. G. a full and complete cargo of coals, and, being so loaded, should therewith proceed to Constantinople. That, pursuant to the said charter-party, T. G. caused the ship to be loaded with a full and complete cargo of coals; and that plaintiffs afterwards, and after the making of the said policy, sent the ship, *so loaded, out to sea in an unseaworthy state, and when she was not in a fit and proper condition safely to go to sea; and that the ship soon afterwards, and while she was on the high seas in the state and condition aforesaid, was wholly lost. [*176

2. To the first count, allegations identical with those in plea 1, down to and including the allegation of the loading with a full and complete cargo of coals. And that plaintiffs afterwards, and after the making of the policy, knowingly, wilfully, wrongfully, and improperly sent the ship, so loaded, out to sea in an unseaworthy state, and when she was not in a fit and proper condition safely to go to sea. And that the ship soon afterwards, and while she was on the high seas, in the state and condition aforesaid, was wholly lost.

3. To the first count, allegations similar to those in plea 1, down to and including the allegation of the loading with a full and complete cargo of coals. And that the plaintiffs afterwards, and after the making of the policy, knowingly, wilfully, wrongfully, and improperly sent the ship, so loaded, out to sea in an unseaworthy state, and when she was

not fitted for the voyage, and when she was not in a fit and proper condition safely to go to sea, and at a time when it was dangerous for the ship to go to sea in the state and condition in which she then was. And plaintiffs wrongfully and improperly caused and permitted the said ship to be and remain on the high seas near to the sea shore, for a great length of time, in the state and condition aforesaid, and without a master, and without a proper crew to manage and navigate her on her said voyage: during which time the said ship, by reason of the premises, became and was wrecked and wholly lost.

*177] *4, 5, and 6. To the second count: pleas corresponding respectively to pleas 1, 2, and 3.

Demurrer to all the pleas. Joinder.

The case was argued in last Michaelmas Term,(*a*) by *Atherton* for the plaintiffs and *Manisty* for the defendant. The course of the argument will sufficiently appear from the judgments. Besides the authorities cited from the Bench, the following were mentioned: Bell *v.* Carstairs, 14 East, 374; Busk *v.* The Royal Exchange Assurance Company, 2 B. & Ald. 73; Bishop *v.* Pentland, 7 B. & C. 219 (E. C. L. R. vol. 14). *Cur. adv. vult.*

There being a difference of opinion on the Bench, the following judgments were now delivered seriatim.

ERLE, J.—By the demurrers to the three pleas in this case, three questions arising upon the meaning of the judgment in Gibson *v.* Small, 4 H. L. Ca. 353,(*a*) must be decided. On the first plea the question is, whether, upon a time policy on an outward-bound ship lying in the port of the *owner's residence*, the shipowner can recover for a loss if he sends her to sea in an unseaworthy state. On the 2d plea the question is, Whether he can recover if he does so knowingly. And on the 3d plea the question is, Whether he can recover if he does so knowingly, and the ship is lost by reason of that unseaworthiness.

*178] *As none of these questions are decided by Gibson *v.* Small, the authority of the Supreme Court does not preclude a free consideration of them. That Court decided that the plea there was bad, seemingly on the ground that, if a ship insured by a time policy is at the commencement of the risk in an unknown sea and in an unknown state, the owner does not warrant that it is in the state requisite for setting out on a voyage. To this extent all the Courts are bound. But, when it is proposed to adopt the opinions of Baron Parke and Lord Campbell there expressed, namely, that there is no warranty of seaworthiness in any time policy, and therefore to hold the first plea in this case bad, whatever deference I may feel for those opinions, still I must pray leave to state my dissent, as well from the opinion as from

(*a*) November 13th, 1855. Before Lord Campbell, C. J., Coleridge, Wightman, and Erle, Js.

(*b*) In Dom. Proc., affirming the judgment of Exch. Ch. in Small *v.* Gibson, 16 Q. B. 141 (R. C. L. R. vol. 71), which reversed the judgment of Q. B. in Small *v.* Gibson, 16 Q. B. 128.

the reasoning from which it was deduced. The reasoning was, that a time policy is to be construed as an ordinary contract in writing by the terms thereof, and not as a contract for marine insurance subjected to the rules of law relating thereto; it being assumed that those rules were laid down for voyage policies, and were not adapted to time policies, at least as far as relates to the warranty of seaworthiness at the commencement of the risk; this warranty in voyage policies being supposed to be implied by law by reason of the owner being supposed to know and to have power over the state of the ship, while the owner in case of a time policy may sometimes not have such knowledge and power to the same extent; it being also assumed that a time policy, silent alike as to warranty and disclosure, and exempt by reason of that silence *from warranty, would not be exempt, by the same reason, from the rule requiring a disclosure of all material facts; [*179 and it being also assumed that the abolition of any security for the state of the ship to the insurer would tend to give simplicity and certainty to this branch of the law. I think this opinion and this reasoning contrary alike to authority and to principle.

As to authority: it does not appear that any person ever expressed the opinion that there was no warranty in any time policy until Baron Parke spoke in the House of Lords. In all the authorities there cited,—see Hollingworth *v.* Brodrick, 7 A. & E. 40 (E. C. L. R. vol. 34), Sadler *v.* Dixon, 8 M. & W. 895,†(*a*) Hucks *v.* Thornton, Holt's N. P. C. 30 (E. C. L. R. vol. 3), Arnould,(*b*) Phillips,(*c*) and Kent,(*d*)—the opinions are in favour of a warranty in time policies analogous to that in voyage policies; and, though there was no adjudication upon the point, yet that was accounted for, because no shipowner before the plaintiff Small was shown to have disputed it.

Again, throughout the stages of Gibson *v.* Small, 16 Q. B. 128, 141 (E. C. L. R. vol. 71), 4 H. L. Ca. 353, the opinions of all Courts and Judges were in favour of some warranty till Baron Parke spoke. The Queen's Bench adjudged for it absolutely. The Exchequer Chamber intimated an opinion for it under such circumstances as are here pleaded. In the House of Lords, every Judge, except Baron Parke, either affirms that there is, or inclines to think that there may be, a warranty [*180 of *seaworthiness in some time policies: and Lord St. Leonards, who was one of the two peers deciding the case, gives an opinion that there is such a warranty under the circumstances here pleaded. To these authorities ought to be added the general expression of the rule as applicable to marine insurance, without an exception of time policies, in the judgments and treatises where it is laid down, and the absence of any marine code of any nation excepting time policies out of the

(*a*) In Exch. Ch., affirming the judgment of Exch. in Dixon *v.* Sadler, 5 M. & W. 405.†
(*b*) Arnould's Treatise On the Law of Marine Insurance, vol. 1, p. 667.
(*c*) Phillips's Treatise On the Law of Insurance, ch. 8, sect. 2, § 727.
(*d*) Kent's Commentaries, part v., lect. 48 (vol. 3, p. 287).

general rules governing marine insurance. Kent(*a*) blends time policies with voyage as if they were subject to the same incidents. "The insurer may take, and modify, what risk he pleases. The policy may be on a voyage out, or on a voyage in, or on the whole complete voyage out and in; or it may be for part of the route, *or for a limited time*, or from port to port, in an intermediate stage of the voyage." So they are blended in the Code de Commerce, Art. 335,(*b*) without distinction. "L'assurance" "peut être faite pour l'aller et le retour, ou seulement pour l'un des deux, pour le voyage entier ou pour un temps limité." In Arnould's treatise, though voyage and time policies are treated of separately, yet he mentions (vol. 1, p. 412) a third class, which indicates that the parties had no conception of an essential difference between time and voyage policies, namely, policies where time and voyage are mixed, at and from London to Cadiz for six months, or from 1st January, 1847, to 1st June, 1847, at and from Bristol to Marseilles.

As, on this review, authority seems to weigh against the opinion contended for, so reasoning upon principle *seems also unfavourable to it. It is said that the warranty of seaworthiness implied on a voyage policy cannot be applied by analogy to a time policy; that on a voyage policy the warranty means fit to go to sea on the voyage, and that, if it has been complied with so that the policy has attached, it is at an end: and that a time policy on a ship being at sea would always be void if seaworthiness in the last-mentioned sense was warranted; and therefore no warranty at all is to be implied. The answer is, that seaworthiness is not used in this last-mentioned sense in respect of warranty. It is laid down in Dixon *v.* Sadler, 5 M. & W. 405,† Sadler *v.* Dixon, 8 M. & W. 895,† and again in Gibson *v.* Small, that the original meaning of the word has long been extended, and that it now means that the ship is fit for its duty in the ordinary degree. It is also clear that, when once fulfilled, so that the policy has attached, it is not always at an end. The case of a policy on ship at and from London on a whaling voyage to the North is almost too trite to be quoted: the warranty is for four gradations: fit for dock in London; fit for river to Gravesend; fit for sea to Shetland; then fit for whaling. The policy attaches if the ship is fit for dock: but the warranty is broken if the other stages of fitness are not completed. See Arnould, vol. 1, p. 670. If the word "seaworthy" has been extended to these four gradations, why may it not be extended by analogy to the middle or end of the voyage, and mean that the ship is then fit in the ordinary degree, that is, without extraordinary risk, to reach its port of destination? In Paddock *v.* Franklin Insurance Company, 11 Pickering (Massachusetts), 227, Shaw, C. J., *says that, if the warranty of seaworthiness implied in voyage policies be implied also in those for time, the word must

*181]

*182]

(*a*) Comm. part v. lect. 48 (vol. 3, p. 307).
(*b*) Liv. II. tit. 10, sect. 1.

be construed with considerable latitude. This is true, and was done by Gibbs, C. J., in Hucks *v.* Thornton, Holt's N. P. C. 30 (E. C. L. R. vol. 3), where a time policy was on a ship which had been in the South Sea for a year, whaling and taking prizes, and the crew was so far reduced by death and desertion as to be inadequate to whaling and guarding prisoners, but was adequate to sailing and getting home. The Chief Justice said: "If the crew could perform some of the objects of their adventure with safety, and navigate the vessel home, she can not be called unseaworthy." The latitude of construction which was adopted in this case for a time policy must also be adopted in respect of every voyage policy for the latter part of a voyage; and, though it is difficult to define the line between seaworthiness and unseaworthiness generally, yet the facts of the majority of cases would probably be so far on one side of the line as to be clear of doubt. The facts in Hucks *v.* Thornton exemplify what would be seaworthiness according to the stage of the voyage. And the facts in Gibson *v.* Small, 4 H. L. Ca. 353, may be referred to as showing what was clear unseaworthiness. In that case the risk began on the 25th September; and the ship had been so damaged by perils of the sea on her voyage before that day that, by reason thereof, she was abandoned as a total loss after that day. The decision that the defendant in that case was liable decided that he must pay for damage which was not within his contract. Furthermore, the nature of the contract of insurance shows that a warranty of the state of the ship is needed equally for policies of marine *insurance, whether they are for voyage, or for time, or mixed. There is [*183 authority for saying that the warranty of seaworthiness is the basis of the contract of the insurer: see the authorities collected in Mr. Wilde's argument in Gibson *v.* Small, 4 H. L. Ca. 356, to which add Duer, Law and Practice of Marine Assurance, vol. 2, p. 671, Lecture 14 (New York, 1846), cited by Mr. Martin in Small *v.* Gibson, 16 Q. B. 143 (E. C. L. R. vol. 71). This proposition cannot be carried into effect as a proposition of law unless the course of business in making marine assurance, and the effect of the decisions upon the well known form adopted for policies, be assumed to be known in law. It is conceded to be contrary to law to take any single voyage policy out of the general class, and construe it as an insulated written contract; equally contrary to law, as it seems to me, is it, so to deal with a class of policies, such as all policies for time, or all policies on ships made of iron, or any other arbitrary class. If the Court can notice the course of business as matter of law in making a voyage policy, so as to make the warranty the basis of the contract in that form, equally so must they notice it in applying the same proposition of law to policies for time: and the proposition, so applied, has the same effect upon both classes of policies for the same reason. Thus, on a proposal of a ship for insurance, a main question for the insurer must always be, whether the risk is ordinary or

extraordinary: and that question never can be answered unless the state of the ship is given. If the ship is seaworthy, in the sense of fit for its service in the ordinary degree, the risk would be so far ordinary, and the premium at the lowest sum which, on an average, would yield
*184] a *profit to the capital, care, and skill embarked. As the generality of ships would be fit for service in the ordinary degree, this would be the ordinary policy; and the contract would be made by underwriting on a proposal containing the name of the ship, the amount to be covered, the duration of the risk, and the premium. In making this contract, the insurer knows the early history of the ship from the register, and the last account from the disclosure of all material facts, and the present state from the warranty of seaworthiness: and, as the duty to disclose and the warranty are universally wanted for policies at an ordinary risk, the law has given to the underwriters security that those duties shall be performed by the assured. For it makes them a condition of the underwriter's promise to indemnify. In this sense they are the basis of his contract. But, if the ship is not fit for its service in the ordinary degree, a disclosure of the defect is essential, to proportion the increase of premium to the risk from the defect. It may be a defect readily remedied; it may be a state bordering on destruction; so that, in case of unseaworthy ships, the insurance would be always in the nature of a special contract; and this is equally applicable to insurance for time or voyage. In the case of a ship with rotten timbers, the premium would be alike increased, whatever was the measure for the duration of the risk. If the warranty of the seaworthiness is in this sense the basis of the contract, it is a term introduced for the interest of the insurer, and is indispensable for him if he is to insure at an ordinary risk. It is called a warranty, because it extends to latent as well as patent defects, and is not limited in the slightest degree by any reference to the knowledge or power of the assured.
*185] *It is applicable alike to all ships, whether at home or abroad, and to every assured, whether foreigner or native, and to every policy, whether for voyage or time. The law gives it as a security to the insurer, so that insurance may be a prudent mercantile investment; and not only for that reason, but also as it operates to prevent fraudulent insurance for the purpose of destruction, and the evils that follow in that train. If this be the meaning of this warranty being the basis of the contract, it is not legal reasoning to construe the contract of the insurer, as in Gibson *v.* Small, 4 H. L. Ca. 353, seems to have been done, to be a wager on the safety of an unknown ship, leaving it to chance whether at the commencement of the risk she was seaworthy or a drifting hull without mast or anchors, as described by the Chief Baron there. Neither is it legal reasoning to exempt the shipowner from the warranty on account of a supposed want of knowledge in him. Still less is a Court justified in gratuitously assuming, as a fact known i

law, that insurers for time have, as a class, less knowledge of the state of their ships than insurers for voyage. With respect to the argument that the warranty of seaworthiness is not required to protect against fraud because that is prevented by the duty of disclosure, I will only observe that, if time policies are to be construed by their written contents alone, there is no authority for importing the duty to disclose from the rules relating to marine insurance, more than the duty to warrant seaworthiness. And, with respect to the argument for annulling the warranty in all time policies, I would observe that the importance of a rule depends on its *accordance with the rights of the parties and its analogy to the other parts of the same branch of law. And, for the reasons above assigned, I submit that the proposed rule, though it might be of easy application for the moment, would really produce injustice and uncertainty. [*186

Upon these grounds I am of opinion that there was a warranty of seaworthiness at the commencement of the risk on the time policy mentioned in the declaration under the circumstances stated in the plea. It follows that the first plea is good: and it further follows, a fortiori, that the 2d and 3d are also good.

COLERIDGE, J., delivered the judgment of Lord CAMPBELL, C. J., in which he stated that he himself and WIGHTMAN, J., concurred.

The question raised by the first plea in this case has never been decided: and we may say that the plea is sufficient, consistently with the judgment of the House of Lords in Gibson *v.* Small. It was there held, according to the opinion of a large majority of the Judges who were consulted by their Lordships, that in a time policy upon a ship, framed in the usual terms, no special circumstances appearing respecting the situation or employment of the ship, there is not an implied condition that the ship shall be seaworthy on the day when the policy ought to attach. So far we are bound: but any opinions given upon the other questions submitted to the Judges must be considered extra-judicial, as they were not necessary to the decision of the case: and the House of Lords was not required to act upon them.

*The first plea here does state special circumstances respecting the situation and employment of the ship, from which we are at liberty to say that in this insurance there is an implied warranty of seaworthiness. These circumstances are, that, at the making of the policy, the ship insured was an outward bound ship, lying in the port of Sunderland, where the plaintiffs resided; that she was then under a charter to carry a cargo from Sunderland to Constantinople; that the plaintiffs afterwards sent the ship loaded with this cargo out to sea in an unseaworthy state, and when she was not in a fit and proper condition safely to go to sea; and that the ship afterwards, while she was on the high seas in that state and condition, was wholly lost. If, under such circumstances, there was an implied condition that the ship should be sea- [*187

worthy at the commencement of the voyage, this plea is a bar to the action.

But I adhere to the opinion which I expressed in Gibson *v.* Small, in conformity to that of a majority of the Judges, that, although the time policy be effected upon an outward bound ship, lying in a British port where the insuring owner resides, a condition of seaworthiness is not to be implied. The supreme Court of appeal judicially determined that, with respect to an implied warranty of seaworthiness, there is a difference between "voyage policies" and "time policies," there being with respect to the one class invariably an implied warranty of seaworthiness, and no such warranty with respect to the other class, at least unless peculiar circumstances are shown from which the warranty is to be implied. There being no usage for implying a *warranty of seaworthiness as to time policies, and there being no decision in favour of such a warranty, and there being a solemn binding decision against such a warranty without special circumstances, I think that, according to principle and according to expediency, it ought not to be implied from the special circumstances alleged in this plea. For the implied warranty of seaworthiness in voyage policies we have established mercantile usage, with a long series of decisions and authorities from text writers of the highest reputation. One reason given for the doctrine is, that in voyage policies the assured may generally be supposed to be aware of the condition of the ship when the voyage is to commence. But the rule is not confined to cases where the assured may be supposed to have this knowledge; for it applies to a voyage at and from a foreign port, the assured residing in England, and it applies to a voyage policy on *goods*, where the assured have no control over the outfit of the ship. I therefore think it would be illogical to infer that the condition of seaworthiness is to be implied wherever the assured has the opportunity of personally making himself acquainted with the state of the ship where the policy is intended to attach. We are now precluded from saying with respect to time policies (as we do say with respect to voyage policies) that, by a general rule, there is an implied warranty of seaworthiness; and much uncertainty and much litigation would arise from the doctrine that it may be implied from special circumstances. Not only would there be great difficulty in determining what special circumstances shall be sufficient for the purpose, but a long course of decisions would be necessary to ascertain the period at which in time policies the *seaworthiness must exist. I conceive that it would be much better to lay down the general rule that in time policies there is no implied warranty of seaworthiness.

*188]

*189]

At the bar it was said that this would be very hard upon underwriters. But they are protected wherever there is any fraudulent representation or concealment; they may make inquiries, and introduce an express warranty; and they may always insist on a premium adequate to the

risk which they run. Their interest is by no means neglected when, in the absence of fraud, they are held liable if the ship exists as a ship when the policy attaches, although the ship be not then seaworthy; for they may judge as well as the assured what is likely to be the condition of the ship at the time when their liability begins. On the other hand, in many cases insurance could not answer its purpose of indemnification to the assured if the proposed condition were to be implied. After the point is conclusively settled that time policies do not in this respect come into the same category as voyage policies, I must respectfully doubt the power of Courts of justice to add by implication a new condition to a written contract *occasionally* and *according to circumstances* where they may think there is the same reason for introducing it as there is in a contract in which, according to usage and undoubted law, it is universally and invariably implied.

Some of the Judges, and Lord St. Leonards (whose authority in every department of jurisprudence is entitled to the highest respect), did express an opinion that, in a time policy on an outward bound ship about to sail from a port where the owner effecting the policy resides, there is an implied warranty of seaworthiness; but there was *a majority of opinions on the other side. And in Jenkins *v.* Heycock, 8 Moore's Pr. C. Ca. 351, the judicial Committee of the Privy Council, consisting of Jervis, C. J., Dr. Lushington, Sir John Patteson, Mr. Pemberton Leigh, and Sir Edward Ryan, since Gibson *v.* Small, 4 H. L. Ca. 353, was decided, and after deliberating upon that case in all its stages, intimated that they were strongly inclined to agree with Lord Campbell and those who thought that in time policies there never is any implied warranty of seaworthiness, although, in the case before them, they were not called upon so to determine. [*190

For these reasons it seems to me that on the first plea, which rests entirely on an implied warranty of seaworthiness, the plaintiffs are entitled to our judgment.

The second plea adds to the allegations in the first that the plaintiffs, "knowingly, wilfully, wrongfully, and improperly sent the ship, so loaded, out to sea in an unseaworthy state, and when she was not in a fit and proper condition safely to go to sea." But, if I am right in what I have already contended for, there was no implied condition of seaworthiness; and the policy attached. If it did, is there enough alleged here to exempt the assurer from liability for the loss? The exact nature of the unseaworthiness is not specified: although the ship was not perfectly seaworthy, there may have been a great probability that she would reach her port of destination: and, there being no averment that the loss was occasioned by the unseaworthiness, it may have arisen from causes which were perfectly unconnected with the unseaworthiness, and which would have produced the *same effect had she been perfectly seaworthy. The assured, therefore, are [*191

not shown to have produced the loss: and, as it is stated in the declaration to have arisen from perils of the sea, I think that for anything disclosed by this plea the plaintiffs are entitled to recover.

But the third plea appears to me to be a bar to the action. Although I still deny any warranty of seaworthiness, I think that, if this plea be true in point of fact, the loss must be considered as accruing from the wrongful act of the assured, which can give them no claim to indemnity. In addition to the statements in the former pleas, this plea avers that the plaintiffs sent the ship to sea "at a time when it was dangerous for the ship to go to sea in the state and condition in which she then was;" and that they "wrongfully and improperly caused and permitted the said ship to be and remain on the high seas near to the sea shore, for a great length of time, in the state and condition aforesaid, and without a master, and without a proper crew to manage and navigate her on her said voyage: during which time the said ship, *by reason of the premises*, became and was wrecked and wholly lost." Here we have personal misconduct charged upon the plaintiffs; which misconduct produced the loss. By the English law of insurance, the assured are not obliged to keep the ship seaworthy throughout the voyage, or during the period of the risk: and, if she is lost by supervening unseaworthiness arising from the negligence of the captain, the underwriters are liable, as if the ship were burnt from his negligence. But it is a maxim of our insurance law, and of the insurance law of all commercial nations, that the assured cannot seek indemnity for a loss produced by their own wrong-

*192] ful act. The plaintiffs' counsel *said truly that the perils of the sea must still be considered the proximate cause of the loss; but so it would have been if the ship had been scuttled or sunk by being wilfully run upon a rock. According to the statement in this plea, the plaintiffs efficiently caused the loss by their wrongful act: and, if so, I think there was no necessity expressly to characterize that act as being either *felonious* or *fraudulent*. Upon the third plea, therefore, I think there ought to be judgment for the defendant.

The pleas to the second count being exactly the same as those to the first count, it follows that there ought to be judgment for the plaintiffs on the fourth and fifth pleas, and on the sixth for the defendant.

Judgment for plaintiffs on first, second, fourth, and fifth pleas: for defendant on third and sixth pleas.(*a*)

(*a*) See the next case.

Jones *v.* The Insurance Company, 2 Wallace, Jr. 278. Grier, J., speaking of the decision of Small *v.* Gibson: "This decision of a doubtful point is of the highest authority, and as I fully assent to the reasons on which it is founded, I consider it conclusive on the general question, and shall therefore content myself by referring to that case when the arguments on both sides of the question have been exhausted by the counsel and court. It is true this

case does not decide, that there is no warranty of seaworthiness at all in a time policy, or that there is not a warranty that the ship is or shall be seaworthy for that voyage, if the ship be then about to sail on a voyage, or if she be at sea that she was not seaworthy when the voyage commenced. It may be true, also, that there is in a time policy a warranty of seaworthiness at the commencement of the risk, so far as lay in the power of the assured to effect it, so that if the ship had met with damage before and could have been repaired by the exercise of reasonable care and pains, and was not, the policy would not attach." See Am. Ins. Co. *v.* Ogden, 20 Wendell, 287.

FAWCUS *v.* SARSFIELD. *Feb.* 23.

Where a vessel is sent to sea in a state not fit for the particular voyage, and, without encountering any more than ordinary risk, is obliged, owing to the defective state in which she sailed, to put into a port for repair, the shipowner, though the defects were not known to him and he has acted without fraud, cannot recover against the insurer the expenses of such repairs as were rendered necessary in consequence of the unseaworthy state of the vessel, though there be no warranty of seaworthiness.

Per Lord Campbell, C. J., Coleridge and Wightman, Js., dissentiente, Erle, J. There is in general no implied warranty of seaworthiness in a time policy. Nor is such implication raised by the facts that the policy was effected in Liverpool, and that the ship was in that port when the risk was to commence, and remained there till she sailed on the voyage in which she was lost, and that there were means of making her seaworthy at Liverpool; it not appearing that the insuring owner knew of the unseaworthiness, or resided in Liverpool or (except from the words West Hartlepool being added to his name at the commencement of the policy) in the United Kingdom.

THE declaration alleged that plaintiff, to wit, on 12th April, 1854, "according to the usage and custom *of merchants, caused to be [*193 made a policy of insurance, which said policy was and is to the tenor and effect following, that is to say: In the name of God, Amen. Robert Fawcus, West Hartlepool, as well in his own name," &c., "doth make assurance, and cause himself and them, and every of them, to be insured, lost or not lost, at and from 15th day of April, 1854, to the 15th day of April, 1855, both days included, in port, at sea, at all times, in all places, and upon all lawful services whatsoever, and wheresoever, with the following printed restrictions:(*a*) Upon any kind of goods and merchandises, and also upon the body," &c., "of and in the good ship or vessel called The Lumley," &c., "beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, upon the said ship, &c.: and so shall continue and endure during her abode there, upon the said ship, &c.; and further until the said ship, with all her ordnance," &c., "and goods and merchandises whatsoever, shall be arrived at as above: upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this

(*a*) Sic. It does not appear on the argument that there were any unusual restrictions in the policy, the tenor of which was set forth in the declaration as above.

voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever, without prejudice to this insurance," &c. On goods valued at 1000*l.*; ship at 2000*l.*; warranted free from capture, &c. The adventures and perils to be of the seas, &c., "and of all other *194] perils, losses, and misfortunes, that have or *shall come to the hurt, detriment, or damage of the said goods, and merchandises, and ship, &c., or any part thereof." Each assurer bound himself to the assured, &c. Corn, &c., warranted free from average, &c. (in the usual terms); and all other goods, also the ship and freight, warranted free from average under 3*l.* per cent., unless general or the ship be stranded. Allegations that the Robert Fawcus in the policy mentioned is the plaintiff; and that, in consideration of 10*l.* paid by plaintiff to defendant as premium for the insurance of 100*l.*, and promise by plaintiff to defendant to perform all things, &c., defendant became insurer to plaintiff, and subscribed the policy as insurer of 100*l.* Allegation of plaintiff's interest. "That, after the said 15th day of April in the year of our Lord 1854, the said ship, whilst on the high seas, having on board the same a cargo of goods to be carried and conveyed thereby on a voyage to parts beyond the seas at and for freight to the plaintiff in that behalf, by the force and violence of the winds and waves, and by storms and tempests, and by other the perils and dangers of the seas, became and was leaky and strained, damaged and injured, so that thereby the same was, with the said cargo, in danger of perishing and being lost and destroyed in the sea, and disabled from completing the said voyage without being repaired as to the damage so by her sustained as aforesaid. And, in consequence thereof, and for the purpose of such repairs and the general safeguard, safety, and preservation of the said ship and cargo, it became and was expedient and necessary that the said ship should sail for and proceed to some port: and, accordingly, the said ship did sail for and proceed to a port beyond the seas *195] and afterwards arrived there; and *a great part of the said cargo was obliged to be, and was, unloaded from the said ship, and stored and warehoused at the said port for the purpose of the said repairs; and the said repairs were done, and a part of the said cargo was loaded again on board the said ship, for the purpose of being carried and conveyed on the said voyage. And, on that occasion, and by reason of the premises, the plaintiff did labour for and about the preservation of the said ship; and, in so doing, and in and about the making of the said repairs and other the premises aforesaid, the plaintiff did necessarily incur, lay out, and expend a large sum of money, to wit, 100*l.*" "That, after the said loss, and during the continuance of the said risks insured against, and while the plaintiff so continued and was interested as aforesaid in the said ship, the said ship, by the perils and dangers of the seas, was forced and cast upon a rock, and was broken, shattered, bulged, and wrecked, and became and was lost to the plain

tiff. By means of which said several losses the plaintiff sustained a loss on the said ship valued as aforesaid, to a larger amount than 3*l.* per cent. on all the money insured thereon, to wit, to the amount of 98*l.* 0*s.* 7*d.*, for each and every 100*l.*" That defendant became liable to pay the 98*l.* 0*s.* 7*d.*, &c., insured thereon. Breach: Non-payment.

Plea 4. "To the said first loss:" "that the said vessel sailed on the said voyage in the declaration mentioned in an unseaworthy and unsound state and condition for the said voyage, and continued in the said state and condition during all the time in this plea mentioned: and that, neither at the time when she so sailed, nor at any time before the first loss in the declaration mentioned, was the said vessel staunch and strong, or *reasonably fit to withstand and safely encounter or bear the ordinary force and violence of the winds and waves on that voyage; and that she did not, from the time of her so sailing on the said voyage up to the time when she so put into the said port, meet with or encounter any storm or tempest, or any more severe weather, or any greater force or violence of the winds or waves, than is usual or ordinary on the said voyage, or than a vessel, reasonably sound, strong, and fit for that voyage, could and would have encountered and borne without damage or injury: and that the said leakiness and damage and injury, by reason of which the said vessel put into the said port for repairs, and the necessity for the said repairs being done, were caused by and arose from the said bad and defective condition of the said vessel, and the exposure of the said vessel in the said condition to the usual and ordinary force and violence of the winds and waves on that voyage. [*196

Plea 7. To the whole declaration: That the said policy was effected and made in Liverpool; and that the said vessel, at the time when the said risk undertaken by the said policy commenced, that is to say on the said 15th day of April, in the year of our Lord 1854, was in the port of Liverpool, and remained in the said port until she sailed on the voyage hereinafter in this plea mentioned: and that at the said port there are and were, during all the time aforesaid, ample and sufficient means of repairing vessels; and the said vessel might have been there fully repaired and made seaworthy. That the said vessel sailed from the said port of Liverpool within a few days after the said 15th day of April, that is to say on the 22d day of April, on a voyage from Liverpool to Richibucto in British America, which is the *said voyage in the declaration mentioned, and upon which said voyage the said several losses in the declaration mentioned accrued: and that the said vessel was not, at the time when she so sailed on the said voyage from Liverpool aforesaid, seaworthy for the said voyage. [*197

Demurrer to fourth and seventh pleas. Joinder.

Issues in fact were also joined on all the pleas.

The case was referred to an arbitrator, who found for the plaintiff on

all the pleas but the fourth and seventh. As to these pleas, the arbitrator found as follows:

"I find, as matter of fact, that the pleas were proved as alleged. But I also find, as matter of fact, that the assured did not know, either at the time of the making of the policy or at the commencement of the risk, that the ship was unseaworthy; and that there was no fraud or concealment on the part of the assured.

"I think fit, under the circumstances, to state this my award in the form of a special case, for the opinion of the Court as to the right of the plaintiff to recover, with reference as well to the special matter I have found as to the question of the goodness of the pleas.

"In case the Court shall be of opinion that, under the circumstances, the plaintiff is entitled to recover, I award and find that he is entitled to recover the sum of 97*l.* 14*s.* 10*d.*: which sum in that case I order that the defendant do pay to the plaintiff on demand. But, if the Court shall be of opinion that, under the circumstances, the plaintiff is not entitled to recover, I award accordingly."

The special case and demurrers were argued in last Term (January 22d), by *Hugh Hill* for the plaintiff, and *Wilde* for the defendant. The
*198] judgments delivered in *this and the preceding (*a*) cases render a statement of the arguments unnecessary. Besides the authorities mentioned in the judgment in this case, the following were cited.

As to plea 4. Arnould's Treatise on the Law of Marine Insurance, vol. 1, p. 652–657; Sadler *v.* Dixon, 8 M. & W. 895;†(*b*) Bermon *v.* Woodbridge, 2 Doug. 781; Holdsworth *v.* Wise, 7 B. & C. 794 (E. C. L. R. vol. 14); Parfitt *v.* Thompson, 13 M. & W. 392;† Redman *v.* Wilson, 14 M. & W. 476;† Émérigon, ch. xii., sect. 9 (vol. 1, p. 388, ed. Boulay-Paty, 1827).

As to plea 7. Michael *v.* Tredwin, 17 Com. B. 551 (E. C. L. R. vol. 84); Arnould, vol. 1, p. 652; Hollingworth *v.* Brodrick, 7 A. & E. 40 (E. C. L. R. vol. 34); Sadler *v.* Dixon; Hutton *v.* Warren, 1 M. & W. 466;† Cuthbert *v.* Cumming, 11 Exch. 405;†(*c*) Brandao *v.* Barnett, 12 Cl. & F. 787; S. C., 3 Com. B. 519;(*d*) Park's System of the Law of Marine Insurances, ch. xi.; Christie *v.* Secretan, 8 T. R. 192, 198; Annen *v.* Woodman, 3 Taunt. 299; Haywood *v.* Rodgers, 4 East, 591; Howard *v.* Shepherd, 9 Com. B. 297 (E. C. L. R. vol. 67); stat. 18 & 19 Vict. c. 111. *Cur. adv. vult.*

There being a difference of opinion on the Bench, the following judgments were now delivered seriatim.

(*a*) Thompson *v.* Hopper, ante, p. 172.

(*b*) In Exch. Ch., affirming the judgment of Exch. in Dixon *v.* Sadler, 5 M. & W. 405.†

(*c*) In Exch. Ch., affirming the judgment of Exch. in Cuthbert *v.* Cumming, 10 Exch. 809.†

(*d*) In Dom. Proc., reversing the judgment of Exch. Ch. in Barnett *v.* Brandao, 6 M. & G. 630 (E. C. L. R. vol. 46), which reversed the judgment of C. P. in Brandao *v.* Barnett, 1 M. & G. 908 (E. C. L. R. vol. 39).

*Lord CAMPBELL C. J.'s judgment was read by Erle, J., who stated that Coleridge and Wightman, Js., concurred in it. [*199

The important question in this case is, Whether, under the circumstances stated in the seventh plea, there was an implied warranty or condition that, at the time when the ship sailed from Liverpool, she should be seaworthy for the voyage on which she sailed. These circumstances are that the policy was effected in Liverpool; that, on the 15th of April, 1854, when the risk was to commence, the ship was in the port of Liverpool; that she remained there till she sailed on the voyage on which she was lost; and that there were sufficient means, while she lay in the port of Liverpool, of repairing her and rendering her seaworthy for the voyage. It is not alleged by the defendant that the plaintiff knew that the ship was unseaworthy, or even that he resided in Liverpool, or in any part of the United Kingdom. The plaintiff, when the policy was effected, may have been a merchant residing in Australia; and he may have sent the ship on a voyage from thence to England, and back again, having insured her by a prior time policy till the 15th of April, 1854. The arbitrator finds, "as matter of fact, that the assured did not know, either at the time of the making of the policy or at the time of the commencement of the risk, that the ship was unseaworthy; and," further, "that there was no fraud or concealment on the part of the assured."

We are not absolutely barred from holding in this case that there was an implied warranty of seaworthiness. The judgment of the House of Lords in Gibson *v.* Small, 4 H. L. Ca. 353.(*a*) was merely [*200 that, upon a time policy where no special circumstances are shown rebutting the possibility that on the day when the risk was to commence the ship might be on the high seas in the middle of a voyage, there is no implied warranty that she should be seaworthy on that day.

But, for the reasons which I gave in the House of Lords in the case of Gibson *v.* Small, and which I have given in this Court in the case of Thompson *v.* Hopper, ante, p. 172, I think that there is no implied warranty of seaworthiness in any time policy. I further think that to imply the warranty of seaworthiness upon a time policy, contended for in this case, is hardly consistent with the principle on which the decision of the House of Lords in Gibson *v.* Small proceeded. The defendant here contends, and must contend, that, on a time policy in this general form, if on the day on which the risk is to commence the ship be in a port in any region of the globe in which there are the means of repairing her and rendering her seaworthy, there is an implied warranty or condition that she shall be repaired and rendered seaworthy before she sails from this port, although the assured may not know that she stands in need of repair, and although he may have no funds nor means of raising

(a) In Dom. Proc., affirming the judgment of Exch. Ch. in Small v. Gibson, 16 Q. B. 141 (E. C L. R. vol. 71), which reversed the judgment of Q. B. in Small v. Gibson, 16 Q. B. 128.

funds there to repair her. With respect to whaling voyages in the South Seas, and other voyages in which time policies are most usual and most required, such a doctrine, I *apprehend, would be exceed- *201] ingly inconvenient, and would prevent shipowners from having that indemnity and security which time policies have hitherto afforded them. The House of Lords were influenced by the inconvenience which would arise from holding that there is an implied warranty of seaworthiness where the risk begins while the ship is on the high seas: and a similar inconvenience would arise from the implied warranty of seaworthiness, the risk beginning when the ship, in the middle of a long adventure, is in a distant port.

Mr. *Wilde*, in his able argument, disclaimed what some have contended for, that under a time policy there is an implied warranty that the ship shall be seaworthy when she sails from any port, where she may be repaired, during the whole period of the risk; and he said "he asked only a warranty for the first voyage." But, if the ship be in a distant foreign port when the risk begins, I can see no difference between the first voyage and any subsequent voyage; and, at all events, without showing that the assured is resident in the place where the port is, and that he has notice of the condition of the ship, it will be difficult to draw a distinction between the case where the ship at the commencement of the risk is in the port of London or in the port of Melbourne. The House of Lords having determined that there would be no implied warranty if the risk were to commence when the ship is a day's sail from the port of Melbourne, it seems strange that there should be an implied warranty of seaworthiness on the same policy, if, from a favourable wind, the ship should have reached the port of Melbourne one day sooner. I must, again, advert to the evils which would necessarily arise from nice distinctions as to the cases in which the war- *202] ranty on a time policy *is or is not to be implied. If the rule first laid down by this Court in Small *v.* Gibson, 16 Q. B. 128 (E. C. L. R. vol. 71), had been confirmed, courts of justice would have had no difficulty in acting upon it: but, when it has once been broken in upon, neither Mr. *Wilde* nor any one else who proposes a modification of it, has laid down any qualified rule for our guidance; and I see no safe course except to adhere to the doctrine that in *all* voyage policies and in *no* time policies there is an implied warranty of seaworthiness. I will only further observe on this part of the case that I do not think that Mr. *Wilde*, with all his learning and ingenuity, was able to bring forward any authority or argument bearing on the question which had not been considered in the House of Lords. In his quotations from Dow's Reports (*a*) Lord Eldon was evidently speaking of *voyage policies;* and the difference between them and time policies was never presented to the mind of that great judge. Where there is a warranty

(*a*) Douglas *v.* Scougall, 4 Dow, 269, 276. Wilkie *v.* Geddes, 3 Dow, 57, was also referred to.

of seaworthiness, the assured need not make any disclosure as to the condition of the ship: but there is no difficulty in saying that, where there is no such warranty, according to the uberrima fides which ought to prevail in the contract of insurance, concealment by the assured of anything exclusively in his knowledge, which would affect the premium, vitiates the insurance: and there can be no doubt that, if the owner of a ship engaged in a distant voyage had received a letter from the captain stating that she had been seriously damaged by a storm, when effecting a time policy upon her he would be bound to communicate this letter to the *underwriters so that they might have an opportunity of calculating and demanding an adequate premium. As [*203 to the alleged absurdity of holding that there is no implied warranty of seaworthiness in this time policy, the ship insured for time sailing from Liverpool to Ceylon, while there would have been such a warranty had the ship been insured at and from London to Ceylon, I can only say that I see no absurdity; for the two contracts are different; and there may well be an incident belonging to the one which does not belong to the other. Then, with respect to what Mr. *Wilde* urged about a ship insured by a time policy having received her death wound the day before the policy was to attach, but keeping afloat till the meridian of that day, and then sinking in a calm sea, I answer that the new policy never would attach; for, according to the supposition, before the time when this policy was to attach she had ceased to be a navigable ship and had become, in the language of Lord Tenterden,(*a*) "a mere congeries of planks."

Upon the whole, it seems to me that in this case the underwriters cannot set up any implied warranty of seaworthiness, and that they are liable for the final loss of the ship, which is allowed to have arisen by the perils of the sea insured against.

But a different question arises respecting their liability for the expense occasioned by reason of her putting into a port to be repaired, the loss to which the fourth plea is pleaded. The arbitrator has found that the facts alleged in that plea are true, although without the knowledge of the assured. What are these facts? *That, when the [*204 ship sailed from Liverpool, she was in an unseaworthy and unsound state and condition, and so continued till after this loss accrued; that she was not reasonably fit to encounter and bear the ordinary force of the winds and waves; that, during this time, she did not encounter any more severe weather than is usual and ordinary on such a voyage or than a ship reasonably fit for the voyage could have encountered without damage or injury: and that the necessity for her going into port to be repaired arose from the defective state of the ship when she sailed.

Although she was not seaworthy when she sailed, it must be taken,

(*a*) In Cambridge *v.* Anderton, 2 B. & C. 691 (E. C. L. R. vol. 9).

according to my view of the case, that the policy attached; but, unless this loss arose from perils insured against, it cannot be cast upon the underwriters. Now the arbitrator appears to find most explicitly that it did not arise from any peril insured against, but from the vice of the subject of insurance. The only answer attempted to this objection, by Mr. *Hill*, was that, for anything alleged by the fourth plea, this was not the first voyage of the ship or the beginning of an adventure, so that the unseaworthiness might have arisen from some peril in an antecedent voyage before she came to Liverpool, part of an adventure of which the voyage stated in the declaration and plea was a continuation. But, if the fourth plea could bear such a construction, I do not think that in deciding this special case we are to be governed by any such technicality. The arbitrator says: "I think fit, under the circumstances, to state this my award in the form of a special case, for the opinion of the Court as to the right of the plaintiff to recover, with reference as well to the special matter I have found as to the question
*205] of the goodness of *the pleas." Now it is quite clear, from the finding of the arbitrator, that the adventure did begin at Liverpool: that this was the first voyage; and that the unseaworthiness arose from the vice of the thing insured, and not from the perils of the sea in any antecedent part of the adventure.

I am, therefore, of opinion that from the total sum awarded a deduction must be made for the expense occasioned by the ship going into port to be repaired, and for her repairs there; but that, subject to this deduction, there ought to be judgment for the plaintiff.

ERLE, J., then delivered his own judgment.

In this case, as to the fourth plea, I concur with the rest of the Court in thinking it good, and assent to the reasons assigned by my Lord for so thinking, if no warranty of seaworthiness is implied by law in respect of the policy in the declaration mentioned.

And, as to the seventh plea, I think it good on the ground that a warranty of seaworthiness is implied by law in respect of this policy under the circumstances stated in the plea. And, as I have stated my reasons for that opinion in the case of Thompson *v.* Hopper, antè, p. 172, I beg to refer to that case instead of repeating them here.

Judgment for the defendant on the fourth plea; for the plaintiff on the seventh plea.

When a vessel, immediately after leaving port, without having encountered any storm springs a leak, she is presumed to have been unseaworthy when she started: Wallace *v.* De Pace, 1 Brevard, 252; Talcot *v.* Insurance Company, 2 Johnson, 124, 130; Patrick *v.* Hallett, 3 Johnson's Cases, 76; Coit *v.* Delaware Insurance Company, 2 Wash. C. C. Rep. 375; Prescott *v.* The Union Insurance Company, 1 Whart. 399.

*MEMORANDA. [*206

In this Vacation,

Charles Jaspar Selwyn, of Lincoln's Inn, Esquire, and Hugh M'Calmont Cairns, of Lincoln's Inn, Esquire, were appointed Her Majesty's Counsel.

And George Hayes, of The Middle Temple, Esquire, Gillery Pigott, of The Middle Temple, Esquire, and Mordaunt Lawson Wells, of The Middle Temple, Esquire, were called to the degree of the coif. They gave rings with the motto *Cedant arma togæ*.

END OF HILARY VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Easter Term,

XIX. VICTORIA. 1856.

The Judges who usually sat in Banc in this Term were:

Lord CAMPBELL, C. J. ERLE, J.

WIGHTMAN, J. CROMPTON, J.

JOHN RICHARD POWLES *v.* EDMUND HIDER. *April* 17.

A cab plying in the streets in London, in the ordinary way, was hired by P. to carry his luggage. The luggage was lost by the fault of the driver. On the cab was the name of H. as proprietor of it, which he in fact was. Y., a licensed driver, was actually driving at the time. P. sued H. on a contract to carry his luggage. Plea: denying the liability. On the trial it appeared that Y. each day paid a sum of money to H. for the use of a cab and two horses for the day, depositing his license with H. before he took the cab out, in compliance with the Metropolitan Hackney Carriage Acts; and Y. made what he could by the use of the cab and horses.

Held that, taking into consideration the provisions of those Acts (1 & 2 W. 4, c. 22, and 6 & 7 Vict. c. 86), the driver must be taken to be the agent of the proprietor with authority to make contracts for the employment of the cab on his account; and, consequently, that the action was rightly brought against the proprietor.

COUNT: That defendant was the proprietor of a hackney cabriolet, under the care and management of his servant; and plaintiff hired the

*208] same of defendant *to carry plaintiff's sons and his servant and his luggage at plaintiff's expense; and defendant as such proprietor promised to carry them safely, and accepted them as passengers and luggage to be so carried: Breach, that the defendant carelessly lost the luggage.

Pleas. 1. Non assumpsit. 2. That the cabriolet was not under the care of defendant's servant. 3. That plaintiff's sons were not accepted

by defendant as passengers. 4. That the luggage was not lost through defendant's negligence.

On the trial, before Lord Campbell, C. J., at the Guildhall sittings after Michaelmas Term, 1855, it appeared that the plaintiff's sons, servant and luggage were taken as passengers and luggage in a hackney cab plying in the streets in London in the ordinary way, and that a trunk of the plaintiffs was lost from the cab through the fault of the driver, who was a person of the name of Young. The defendant was the registered proprietor of the cab; and his name, as that of the proprietor, was on a plate affixed to the cab. This was the plaintiff's case. The defendant gave evidence that he was the registered proprietor of many cabs including this: that Young was a licensed driver who daily came to the defendant, and hired from him a cab and two horses, which he was permitted to work for fifteen hours. Young always, before he took out the cab, paid a sum of money, the amount of which varied according to the season of the year. On the day in question it was 14*s.* 6*d.* Young, having paid this sum, made what he could of the cab for the fifteen hours, receiving the fares for his own benefit, the defendant exercising no control over him. Before Young was permitted to take out the cab he deposited his license with the defendant.

*On this evidence the Lord Chief Justice directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendant. [*209

Bovill, in the ensuing Term, obtained a rule Nisi accordingly.

H. Hill and *Joseph Addison* now showed cause.(*a*)

The question is, Whether the registered proprietor of a hackney carriage in London is responsible for the licensed driver whom he permits to drive, under such arrangement as that which existed between the defendant and Young. The relation between these parties cannot be properly understood without reference to some of the provisions of the Metropolitan Hackney Carriage Acts. Stat. 1 & 2 W. 4, c. 22, s. 6, prohibits any person from keeping, using, or letting to hire any hackney carriage, within the Metropolis, without a license. Sect. 20 requires that, on the hackney carriage shall be affixed a plate on "which there shall be painted, in letters and figures of black upon a white ground, the christian name and surname of the proprietor or of one of the proprietors of such hackney carriage." The object of this enactment obviously was to inform the person hiring the carriage of the name of the person licensed to let it to hire, with whom, and not with the actual driver, his contract for hiring it was made. Stat. 6 & 7 Vict. c. 86, by sect. 10 prohibits any person from acting as driver of a hackney carriage without a license. Sect. 21 requires that the proprietor of a

(*a*) Before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js. Wightman, J., left the Court before the end of the argument.

*210] hackney carriage, before he *permits a licensed driver to take it out, "shall require to be delivered to him, and shall retain in his possession, the license of such driver or conductor while such driver or conductor shall remain in his service;" and the proprietor is by sect. 28 made liable to a penalty for the misconduct of the driver; and by sect. 35 he is bound, when required, to produce the driver; and on failure is himself to pay. These provisions all show that the proprietor is responsible for the driver. In Morley *v.* Dunscombe, 11 Law Times, 199, at Nisi Prius, where the facts were very similar to the present, it was ruled that the proprietor was answerable for the driver as his servant; and this Court refused a rule for a nonsuit. [CROMPTON, J.—The proprietor of a carriage may, at common law, let it to a person not his servant, for whom he would not be responsible. Do you go so far as to say that the Metropolitan Hackney Carriage Acts make the proprietor responsible for the driver, even if the contract between them is such as, at common law, would not create the relation of master and servant between them?] By the enactments no one but the proprietor may let the carriage to hire: that being so, the driver, in making the actual letting to hire, must either be the servant of the proprietor, or act illegally. At all events, when the agreement between the driver and proprietor is one capable of the construction which will make the whole legal, it will be so construed, and the driver must be held the proprietor's servant.

Bovill and *Holland*, in support of the rule.—If Young was the ser-

*211] vant of the defendant no doubt the defendant *is liable: but if the relation of master and servant did not exist the defendant is not liable; Quarman *v.* Burnett, 6 M. & W. 499,† Knight *v.* Fox, 5 Exch. 721;† unless there is an express enactment to make him so. Now the ownership of the cab, and the fact that the defendant's name appeared upon it, may be primâ facie evidence that the driver was the defendant's servant, just as the captain of a vessel is primâ facie presumed to be the servant of the registered owner though the contrary may be shown: but nothing is left to presumption here; for the actual contract between the defendant and Young is proved. Young may, it appears, go where he pleases, and do what he likes with the cab during the fifteen hours: the defendant has no right to complain if Young does not exert himself to obtain fares; indeed it is for the proprietor's interest that the driver should allow the horse to rest. The term is very short; but it is a demise of the cab for a term, during which Young was not the servant of the defendant, subject to his orders, but the bailee of the cab, free from his control. Then the Metropolitan Hackney Carriage Acts do not enact that the proprietor of a cab shall not let the cab out to hire to a bailee, or that the driver must be the servant of the proprietor. There are enactments making the proprietor to some extent responsible for the driver; but those enactments rather

show that it was not contemplated that the proprietor must be responsible at any rate as master of the driver. If it was the intention of the Legislature to prohibit demises of cabs, there are no words in the enactments to express such an intention: and, as the drivers are also licensed, *and registered, there seems no object for such a prohibition. *Cur. adv. vult.* [*212

Lord CAMPBELL, C. J., on a subsequent day in this term (April 25), delivered judgment.

This is an action of contract: and the true question which we have to determine is, Whether there was such a contract between the plaintiff and the defendant as the declaration alleges. If the defendant be right in his contention, that in point of law the cab and horses must be considered as let to hire to Young, the driver, for fifteen hours, in consideration of the sum of 14*s.* 6*d.*, and that Young must be considered the bailee, and entitled to make what use he pleased of them during that time, Young could not render the defendant liable on any contract into which he entered for the use of the cab; and the plaintiff, being without remedy against the proprietor, could only sue Young, the hirer and bailee. But, looking to the position of the proprietor, and the driver of a cab, under the circumstances proved, and to the Acts of Parliament which regulate their respective duties, we are of opinion that the driver is to be considered the servant or agent of the proprietor, with authority to enter into contracts for the employment of the cab on which the proprietor is liable. There can be no doubt that this would be so, if the driver were engaged at fixed wages, accounting to the proprietor for all the earnings of the cab. But must not the actual arrangement between them be equally considered a mode by which the proprietor receives what may be estimated as the average earnings of the cab, *minus* a *reasonable compensation to the driver for his labour? To stimulate the industry and zeal of the driver, he is allowed to pocket all the earnings of the cab, above a given sum: but it is from the earnings of the cab that this sum is paid; and it is evidently calculated on both sides that the earnings of the cab will exceed this sum, which varies according to the season of the year. This is quite different from hiring a job carriage or a carriage and horses to be driven by the hirer or his servant, where the hirer becomes bailee, and can in no sense be considered the servant of the proprietor. The Acts of Parliament referred to always regard the proprietor and driver of the hackney cab as employer and employed, or master and servant, and clearly contemplate that the party who engages the cab under the care of the driver shall have a remedy against the proprietor. The 20th sect. of stat. 1 & 2 W. 4, c. 22, requires that every hackney carriage shall at all times have upon it a plate with the Christian name and surname of the proprietor of such hackney carriage: and the cab in question, when hired by the plaintiff, had upon it a plate with the name and [*213

surname of the defendant as the proprietor. The proprietor who applies for and accepts a license to which such a condition is annexed, and employs his cab under it, must be considered to hold himself out to the world as the proprietor; and he must incur the liabilities of proprietor to all who use the cab with the authority of the driver in the ordinary course of dealing. If the proprietor does not drive it himself, he declares that the driver is his servant. Again, the sects. 23, 24, 27, 28, of stat. 6 & 7 Vict. c. 86, clearly consider that the driver is a person
*214] appointed by the proprietor for whom, in the *exercise of his employment as driver, the proprietor is answerable. It would be most inconvenient and unjust towards the public if an action, such as the present, brought against one who proclaimed himself to be the actual proprietor of the cab, when it was engaged by the plaintiff, and actually was so, could be defeated by evidence of a secret agreement between the proprietor and the driver with respect to the remuneration of the driver, and the proportions in which the earnings of the cab are to be divided between them.

On such considerations Morley *v.* Duncombe, 11 Law Times, 199, appears to have been decided. This decision is expressly in point; and we think that we ought to abide by it.

We have examined all the authorities cited on behalf of the defendant: but we do not find that any of them are conflicting. Therefore, without thinking it necessary to comment upon them, we give judgment for the plaintiff. Rule discharged.

*215] *The MATLOCK Gas-Light and Coke Company *v.* PETERS.
April 18.

By order of Nisi Prius, a cause and all matters in difference were referred to an arbitrator, who was empowered to direct a verdict for plaintiff or defendant, or a nonsuit; the costs of the action to abide the event of the award.

The arbitrator directed that a verdict should stand for plaintiff, for substantial damages which he adjudged to be due from defendant to plaintiff, and that certain lamps, in respect of which plaintiff made a claim for damages in the declaration, should be delivered up to defendant.

Held, that plaintiff was entitled to the costs of the action.

THIS cause came on to be tried before Lord Campbell, C. J., at the Middlesex Sittings after last Trinity Term: when, by order of Court and with consent of parties, a verdict was taken for the plaintiffs for the claim in the declaration, and 40*s.* costs, subject to the award, certificate, order, &c., of an arbitrator, who was empowered to direct that a verdict should be entered for the plaintiffs or defendant, or a nonsuit be entered, and to whom the cause and all matters in difference between the parties were thereby referred. And it was likewise ordered, with like consent, "that the costs of the cause shall abide the event and determination of the said award or certificate; and the costs of the refer-

ence and award or certificate shall be in the discretion of the said arbitrator."

The arbitrator awarded that the verdict ordered to be entered for the plaintiffs should stand, with 31*l.* 14*s.* 6*d.* damages, which sum he did "adjudge and declare to be justly due from the said defendant to the said plaintiffs; and that the street lamps mentioned and referred to in the fourth breach, in respect to which the plaintiffs claimed to be entitled to recover damages under the first count of the declaration in the said cause, are to be delivered up to the defendant." He further ordered that each party should pay his own costs of the reference, and that the plaintiffs should pay the costs of the award.

*The Master taxed the costs of the action for the plaintiffs against the defendant. The defendant thereupon took out a [*216 summons to set aside the taxation. The summons was heard at Chambers, before Erle, J., who dismissed it with costs.

Watson now moved for a rule to set aside the taxation and rescind the order of the learned Judge.—There is, properly speaking, no event or determination of the award in favour of either party; for, though the verdict is to stand for the plaintiffs, the lamps are to be delivered up to the defendant. That is only a determination of the action itself in favour of the plaintiffs, not of the award. In Boodle *v.* Davies, 3 A. & E. 200 (E. C. L. R. vol. 30),(*a*) a cause and all matters in difference were referred; the arbitrator to have power to state how a certain passage, &c., should be enjoyed, and who should have the management thereof, and to abate illegal erections; the costs of the action, reference, and award to "abide the event of the said award." The action was in trespass; and the arbitrator found that the defendant had committed trespasses in respect of some of the matters complained of in the action; but he decided some matters in favour of the plaintiff and some in favour of the defendant. He also awarded that the costs of the action, reference, and award should be paid by the defendant. But the Court said: "The costs of the action were to abide the event of the award. There has been no event of the award for this purpose. The arbitrator had no power to say anything of costs." And there Patteson, J., said: "The form of the reference is singular. Where an action is depending, it is *reasonable to provide that the costs shall abide the event; [*217 but where all matters in difference are referred, it seems that under such an order as to costs, each party must pay his own, unless everything is found in favour of one." In Yates *v.* Knight, 2 New Ca. 277 (E. C. L. R. vol. 29), where, under a reference of an action and all matters in difference, by which the costs of the suit, and of the reference and award, were "to abide the event of the award," the arbitrator had directed that the suit should cease, each party giving a general release, and that the defendant should give up certain articles

(*a*) See Chittenden *v.* Walker, 3 A. & E. 691.

to the plaintiff, and the plaintiff pay a sum named to the defendant, the Court of Common Pleas held that the event was such that each party should pay his own costs.

Lord CAMPBELL, C. J.—Those cases are clearly distinguishable from the present. The submission here empowers the arbitrator to order a verdict or nonsuit; and the award expressly directs a verdict for the plaintiffs; and that, as to the action, is the event of the award.

WIGHTMAN, ERLE, and CROMPTON, Js., concurred.

Rule refused.(*a*)

(*a*) See Gribble *v.* Buchanan, 18 Com. B. 691 (E. C. L. R. vol. 86).

---

*218] *EDWARD HARRUP, Appellant, *v.* HENRY BAYLEY and Others, Respondents. *April* 19.

A town improvement Act gave a right of appeal against any order of the Commissioners to any person aggrieved by it. At a meeting of rate-payers it was resolved that the Commissioners be empowered out of the town funds (raised under the Act) to prosecute an application to Parliament for a local act. The application failed. The Commissioners made an order for the payment of the expenses out of the town funds. The mover of the resolution empowering the Commissioners to promote the bill appealed as a rate-payer against this order.

Held, that he was precluded from appealing as aggrieved by an act which he had sanctioned.

BY the Stalybridge Improvement Act, 9 G. 4, c. xxvi.,(*a*) Commissioners were to be elected for carrying the Act into effect. The Act contains provisions for rating the owners and occupiers of property in Stalybridge for the purposes of the Act, and appropriates the money (hereinafter called the town funds) thus raised to those purposes. By sect. 181 an appeal is given to the Sessions either of Lancashire or of Cheshire, to "any person or persons who may think himself, herself, or themselves aggrieved by" any rate or order made under the Act.

The appellant was the owner of property liable to be rated. He had given notice of appeal against an order, made on the 5th April, 1855, by the respondents, who were at that time the Commissioners under the Act, on their Treasurer for the payment of money. By order of a Judge a case was stated, under stat. 12 & 13 Vict. c. 45, s. 11, for the opinion of this Court. Only the part of the case material to the point on which the Court decided is stated in this report.

After stating that the Commissioners had, on 20th November, 1854, ordered that application should be made to Parliament, for a Waterworks' Act for Stalybridge, and had been informed by their clerk that the ex-

*219] penses of *promoting the bill could not lawfully be paid out of the town funds, the case proceeded to the effect following.

(*a*) Local and personal, public: "For lighting, watching, and otherwise improving the town of Stalybridge in the counties palatine of Lancaster and Chester, and for regulating the police thereof; and for regulating a market, and erecting a market place, within the said town."

A meeting was held on the 23d November, A. D. 1854, pursuant to the following notice. "Town of Stalybridge. Supply of water from Swineshan Brook. Important meeting of the owners of property in Stalybridge. The Commissioners of Police of Stalybridge hereby give notice that, in consequence of the great opposition that is expected from The Ashton Waterworks Company to the proposed waterworks scheme, of which the Commissioners have given notice for an application to Parliament, and of the threats which are held out for restraining them expending the town's funds such application, a public meeting of the owners of property in the town of Stalybridge will be held in the Town Hall, on Thursday next, the 23d day of November instant, at 11 o'clock in the forenoon, for the purpose of deciding what course the Commissioners shall, under the circumstances, take for the benefit of the town. John Cheetham, Esq., M. P., will occupy the chair. All owners of property are requested to attend. Stalybridge, 21st November, 1854. HENRY LEES, Clerk to the said Commissioners." John Cheetham, Esq., M. P., mentioned in the said notice, presided as chairman at such last-mentioned meeting, and stated, amongst other things, to the meeting that the expenses of the said last-mentioned intended application to Parliament could not be charged on or paid out of the rates under the Stalybridge Improvement Act, which is the said Act of 9 G. 4. The following resolutions were passed at such last-mentioned meeting. "That this meeting is of opinion that it is highly essential that the town of Stalybridge should be supplied with better water than it *is in the power of the Duckenfield Waterworks Company to afford, and that an excellent supply of pure [*220 spring water may be obtained from the Swineshan Brook, and that it would be greatly to the advantage of this town if Parliamentary authority were granted to the Commissioners of Police of Stalybridge, as the administrators of the local interest, enabling them to secure such water, and under their superintendence to supply the same to the inhabitants, and after paying expenses to apply the profits in aid of the local rates." The appellant was present at the above-mentioned meeting: and, the above resolution having been proposed and carried, a second resolution was then proposed; whereupon the appellant rose and observed that a portion of such second resolution was inconsistent with the first resolution; and, in consequence of this suggestion, a part of the said second resolution was struck out. The resolution so altered was then read by the Chairman, who asked the appellant whether, as so altered, it met his approbation? to which he answered "Yes:" upon which it was so put to the meeting, and carried with one dissentient voice; the appellant not being the dissentient. Such second resolution was as follows: "That the Commissioners be, and they are hereby, empowered out of the town's funds to prosecute the application to Parliament, of which they have given notice, for an Act enabling

them to obtain such water." The case then stated that, on 12th December, A. D. 1854, a meeting was held pursuant to a notice placarded publicly within the said town of Stalybridge, of which notice the following is a copy: "Waterworks. Meeting of the Rate-payers. Public notice. The rate-payers of Stalybridge are most respectfully(*a*) informed
*221] that a meeting of rate-payers will be *held in the Town Hall on Tuesday, December 12th, for the purpose of taking into consideration the propriety of empowering the Commissioners to apply to Parliament for power to construct waterworks for the supply of those districts contemplated in our Amended Bill Gas Works, and also to amend several clauses relative to the qualification of Commissioners and electors, and likewise to amend such portions of the Act relating to the sanatary condition of our vast increased and increasing population. By order of the Observation Committee. JOHN WOODCOCK, Chairman. EDWARD HARRUP, Secretary. Chair to be taken at 7 o'clock, P. M. Rate-payers fail not to attend." At such last-mentioned meeting resolutions were passed, of which the following is a copy. "That this meeting is of opinion that it is essential that every effort should be made by the rate-payers, through their Commissioners, to obtain an Act of Parliament for supplying the town of Stalybridge with water from the Swineshan Brook for the benefit of the town, and that such notice also embrace the purchase of the Stalybridge Gas Works, and such alterations of the Police Act, and all other Acts which may interfere with the passing of such bill." On 18th December, A. D. 1854, at a meeting of the said Commissioners, a resolution was passed, of which the following is a copy. "This meeting, having by letter from the town clerk of Ashton-under-Lyne been informed that the Corporation of Ashton had purchased the Ashton-under-Lyne Waterworks, and that the terms of purchase are, that Messrs. Worthington & Earle's scheme for the Swineshan Brook is handed over to the Corporation, and that the sceme is abandoned on the understanding that the Stalybridge Commissioners abandon their scheme for the Swineshan Brook for this
*222] session, *and that Mr. John Wooley having also undertaken at this meeting that the intended application to Parliament in this session by the Duckinfield Waterworks Company shall also on the above terms be abandoned, and that he will procure that undertaking in writing from such company. Resolved unanimously, that, under all the circumstances, and in consideration of the above undertaking being honourably performed, it is advisable for the Commissioners to abandon their scheme for this session; and the same is hereby agreed to be abandoned accordingly." The case then stated in substance that no proceedings were taken to promote the application to Parliament after this resolution.

On the 5th April, 1855, the Commissioners made an order on their

(*a*) Sic in paper-book.

treasurer to pay out of the town funds various specified sums "in respect of the costs, charges, and expenses incurred by the Commissioners in the late intended application to Parliament for the Stalybridge Improvement Waterworks, Gas Works, &c., Bill." This was the order appealed against. It was objected to at the time, by some of the Commissioners, as illegal; but the money was paid in obedience to it. After this the appellant objected to the order, and gave notices of appeal. The case stated various questions. The only one on which the Court pronounced an opinion was the third, which was as follows.

3. If such appeal do lie; whether the said appellant can avail himself of it?

H. Hill, for the respondents.—It appears that this appellant not only attended the meeting at which the application of the town funds to this purpose was sanctioned, but himself settled the form of the *resolution. Assuming that other rate-payers might appeal, as parties aggrieved in consequence of this resolution being acted [*223 upon, the appellant is precluded from saying that he is aggrieved by what he himself procured. The are many analogous cases in which this principle prevails. A conveyance by a trader, under such circumstances as to be an act of bankruptcy, will not support an adjudication of bankruptcy on the petition of a creditor who was a party to the conveyance. A cestui que trust who has assented to a disposal of trust funds cannot be heard as a plaintiff in equity to complain of the breach of trust; if the others beneficially interested sue, they must make the consenting cestui que trust a defendant; Trafford *v.* Boehm, 3 Atk. 440. So it is where a shareholder in an incorporated company has acquiesced in an application of the company's funds; he cannot challenge it in equity as improper; Graham *v.* The Birkenhead and Cheshire Junction Railway Company, 2 Macn. & G. 146.

Monk, contrà, was called upon to answer this objection. He contended that the appellant had done no more than approve of the application of the funds, if legal.

Lord CAMPBELL, C. J.—I am of opinion that the objection must prevail. An appeal does not lie except where given by express statute. In the present case, the Act, by sect. 181, gives an appeal to any person who may think himself aggrieved; but that does not mean to any person who says or fancies he is aggrieved. Giving it a reasonable construction, the enactment means to give an appeal to any one who has legal ground for *saying he is aggrieved. Now, how can such a provision apply to a person who wishes to complain of the [*224 act which he himself authorized, and expressly required to be done? A meeting was called to consider whether these expenses should be paid out of the town funds. All who were present were told it could not legally be done against the consent of the rate-payers. The appellant

then procured an alteration in the form of a resolution, and himself expressly approved of the altered resolution, which empowered the Commissioners out of the town funds to prosecute the application to Parliament. The order complained of was made to carry out that resolution and pay the expenses incurred under it. How can the appellant say he is aggrieved by this order? Volenti non fit injuria. According to every principle of justice he cannot complain of what was his own act.

ERLE, J.—The Act makes it a condition precedent to the appeal, that the person appealing shall think himself aggrieved, that is, shall have legal grounds for thinking himself aggrieved by what he appeals against. Now, in this case, I find that the appellant consented to the act of which he now complains. He empowered the Commissioners to take a step which at the time he expected to produce benefit to him. He now says, I am aggrieved because you did what I requested. But in my opinion no right of the appellant's was impugned, when the town funds, so far as they were his, were applied to this purpose by his consent.

CROMPTON, J.—I agree that the appellant has no locus standi unless
*225] bonâ fide aggrieved by the order *complained of. Mr. *Monk* argues that the effect of what took place at the meeting was that the rate-payers approved of the application of the town funds, only if it could be legally done; but that was not the effect of the resolution. It seems clear to me that the parties all thought that the application of the funds would not be legal, though it would be beneficial. They wished that the Commissioners had the power; and they resolved, as far they were able, to empower them to do what was, in their opinion, beneficial. Now, though others, not parties to that resolution, may be entitled to complain that it was acted on, I think the appellant is precluded from saying that he is aggrieved by what was his own act.

Judgment for the respondent.

The QUEEN *v.* PETERS, Clerk. *April* 21.

By a private Act (5 G. 1, c. 19), constituting a township a distinct parish, a vestry was to be triennially elected, for the preserving better order in the new parish, for better raising and ascertaining all taxes and assessments for buying bells for the church, finishing it and keeping it in repair, defraying the expenses of the churchwardens concerning the same, providing stipends for rector and parish clerk, and salary for scavenger, and making orders and by-laws, and keeping and maintaining good rules and order in and about the church. The statute gave the vestry power and authority to appoint and remove scavengers, to make by-laws and rules relating to the church, to rate occupiers in the parish for defraying the expenses of buying bells, finishing the church, raising stipends for rector and parish clerk, and salary for scavenger. The statute also subjected the inhabitants to the customs of the parish of which the township had formed part for the choice of churchwardens, overseers, and other parish officers: and the vestry of the new parish, in pursuance of such custom, chose the churchwardens (one nominated by the rector), nominated the overseers and parish constables (who were afterwards

appointed and sworn in, respectively, by the justices). and appointed inspectors of weights and measures, and laid rates for the purposes mentioned in the Act.

Held, that such vestry was within the meaning of sect. 52 of stat. 15 & 16 Vict. c. 85, as a vestry "elected under the provisions of any local Act of Parliament for the government of any parish by vestries;" and must therefore, on the requisition of rate-payers under sect. 10 (extended by stat. 16 & 17 Vict. c. 134, s. 7), be convened for the special purpose of determining whether a burial ground should be provided, under the Act, for the parish.

WATSON moved for a rule calling on the Reverend Henry Peters, clerk, rector of the parish of *Sunderland near the Sea in the county of Durham, commanding him to convene a meeting of [*226 the vestry appointed and acting for the said parish under stat. 5 G. 1, c. 19, for the special purpose of determining whether a burial ground should be provided for the said parish, under stat. 16 & 17 Vict. c. 134.

He moved upon a statement of the following facts.

By stat. 5 G. 1, c. 19 (Private, "for making the town and township of Sunderland a distinct parish from the parish of Bishopwearmouth, in the county of Durham"), it was enacted that the township of Sunderland, being then a township of the parish of Bishopwearmouth, should, from 1st May, 1719, "be, remain, and continue a separate and distinct parish of itself," "by the name of the Parish of Sunderland near the Sea," and should "be divided and exempt from the said parish of Bishopwearmouth, and of and from all offices, charges, contributions, and dependences whatsoever, for or in respect thereof, and any way concerning the same;" and that a church, then newly erected, and a parcel of ground then newly enclosed, should be the church and churchyard. That there should be a rector; the patronage to be vested in the Bishop of Durham for the time being. "And that the inhabitants of the same parish shall from time to time, and at all times hereafter, be subject and liable to the customs and usages for the choice of churchwardens, overseers of the poor, and other parish officers within that parish, as the inhabitants of the said parish of Bishopwearmouth have hitherto been. And for the preserving better order in the said parish of Sunderland, and for the better raising and ascertaining for the future all taxes, assessments, and contributions which are or shall be necessary for or towards buying of bells for the *said new church, [*227 and for finishing the said church, and keeping the same in good repair, defraying the yearly expenses, and disbursements of the churchwardens concerning the same; as also for the making a provision for the rector, to be appointed for the said rectory of Sunderland and his successors; and also the parish clerke there, and his successors; and for the raising a competent summ yearly, as a salary for a scavenger, to be appointed for the said towne of Sunderland, as hereafter directed; and for the enabling the making of orders and by-laws, and keeping and maintaining of good rules and orders in and about the said church there:" it was enacted that, within three months after the

1st of May, 1719, the rector or minister for the time being, on some Sunday in the forenoon, immediately after divine service, should in the said church give public notice to the parishioners to meet in the vestry room, at a day and place which he should then name for that purpose, "to choose vestrymen for the purposes aforesaid;" the majority of the inhabitants paying scot and lot to choose twenty-four inhabitants of the parish, each having a freehold estate or other estate of inheritance of the yearly value of 10*l*., to be vestrymen for three years, and so on for every three years: and, within twenty days after the death of any vestryman, like notice to be given for choosing a vestryman, similarly qualified, in his place. The rector and thirteen or more of the vestrymen, or the major part of them, to have full power and authority to appoint a scavenger, and to displace such scavenger and appoint a successor, as they should think fit; "and also, from time to time, to make such by-laws and rules, in matters relating to the said church, as shall
*228] be thought most proper and convenient, so as the same *be consistent with the laws of this realm (provided the same be, from time to time, ratified and confirmed by four or more of the justices of the peace of His Majesty or His successors, of the said county of Durham). And shall, and may, and are hereby authorised, and required, from time to time, equally to rate, tax, and assess all the tenants, occupiers, and farmers of all the houses, keys, lands, tenements, and hereditaments, and estates whatsoever in the said parish of Sunderland; and also stock in trade and personal estates, with such summ or summs of money as they or the major part of them, then and there assembled, shall think just and reasonable; (having a due regard to the yearly rents or value of such houses, keys, lands, tenements, or hereditaments, and other estates; and to the true value of such stock in trade and personal estates,) for defraying the charges and expenses of procuring and obtaining this Act of Parliament, and for and towards buying of bells for the said church; and for the doeing, finishing, and perfecting what shall be thought fit and convenient to be further done in and about the said new church; and for keeping the same in repair, defraying the yearly expenses of the churchwardens concerning the same; and for the raising the yearly summ of 80*l*., for a stipend for the rector for the time being; and the further yearly sum of 10*l*. for the clerke of the said parish of Sunderland, for the time being; and a competent summ yearly, as a salary for a scavenger, to be appointed as aforesaid, to be for ever hereafter payable, and paid to the rector of the said new church and clerke of the said parish for the time being, and to the scavenger for the time being, by quarterly payments," at, &c. The sums assessed, in case of default of payment, to be levied by distress and sale under warrant of justices.

*229] *Since the passing of this Act the vestry have been chosen in conformity with the provisions of the Act; and the powers exer-

cised by them, at meetings duly convened by the rector, have been as follows. They annually choose the churchwardens, of whom the rector nominates one: and the vestry also nominate the overseers and parish constables, according to the usage of the parish of Bishopwearmouth, to which the Act makes the inhabitants subject. The magistrates appoint the overseers, and swear in the constables, nominated by the vestry. The vestry also assess a rate on the occupiers and tenants of rateable property, for keeping in repair the church and churchyard, for the yearly expenses of the churchwardens in repairing the same and the performance of divine worship, for the stipend of the rector, and the salary of the parish clerk. Up to 1810, when an Act (50 G. 3, c. xxvii., local and personal, public, "For paving, lighting, watching, and cleansing the town of Sunderland near the Sea, in the county of Durham; for removing the market; for building a town-hall or market-house; and for otherwise improving the said town; and for establishing a watch on the river Wear") passed, the commissioners under which appointed and paid a scavenger for the town, the vestry appointed a scavenger, and paid him out of the said rate. The vestry have also yearly appointed an inspector of weights and measures for the parish, and have generally had the management and transaction of all matters of business relating to the church and churchyard, and have paid the expenses of enlarging the churchyard out of the rate assessed under the Act. The vestry have no other government or authority over the parish.

*On 15th September, 1855, certain rate-payers of the parish, being more than ten in number, signed a requisition addressed to the rector, whereby they required him "to convene a meeting of the vestry appointed and acting for the said parish under an Act," &c. (5 G. 1, c. 19), "for the special purpose of determining whether a burial ground shall be provided for the said parish, under an Act," &c. (16 & 17 Vict. c. 134, "To amend the laws concerning the burial of the dead in England beyond the limits of the metropolis, and to amend the Act concerning the burial of the dead in the metropolis"). This was presented to the rector, who, by a written answer of the same date, stated that he declined "to convene a meeting of the vestry required by the foregoing requisition, on the ground that the vestry appointed and acting for the parish under the Act passed in the year 1719, mentioned in such requisition, is not the vestry contemplated by the statute 16 & 17 Vict. c. 134, for the purpose of determining whether a burial-ground should be provided for the said parish under the said last-mentioned Act." [*230

Watson having made this statement, which was verified by affidavits, referred to stat. 15 & 16 Vict. c. 85, "to amend the laws concerning the burial of the dead in the metropolis," sects. 10 and 52. The Court then called on

Knowles and *W. Digby Seymour*, who showed cause in the first

instance.—The rector requests the direction of the Court: he has, of course, no personal interest in the question. By sect. 10 of stat. 15 & 16 Vict. c. 85 (extended to parishes not in the metropolis, by stat. 16 & 17 Vict. c. 134, s. 7), on a written requisition of *ten or more rate-payers of a parish, "the churchwardens or other persons to whom it belongs to convene meetings of the vestry of such parish shall convene a meeting of the vestry, for the special purpose of determining whether a burial ground shall be provided under this Act for the parish." By the interpretation clause, sect. 52, "'vestry' shall mean the inhabitants of the parish lawfully assembled in vestry, or for any of the purposes for which vestries are holden, except in those parishes under which there is a select or other vestry elected under" stat. 59 G. 3, c. 12, or stat. 1 & 2 W. 4, c. 60, "or elected under the provisions of any local Act of Parliament for the government of any parish by vestries, in which parishes it shall mean such select or other vestry." The doubt which has occurred is, whether the vestry under stat. 5 G. 1, c. 19, can be comprehended under the general term "vestry," its functions being limited by statute and practice to the management of the church and churchyard, the payment of salaries to the rector and parish clerk, the nomination of churchwardens, overseers, and parish constables, and the appointment of inspectors of weights and measures, and the laying a rate for such purposes. [Lord CAMPBELL, C. J.—Can there be concurrent vestries?] There certainly are, in the private Act, the general words "for the preserving better order in the said parish of Sunderland."

*231]

Per Curiam (Lord CAMPBELL, C. J., WIGHTMAN, ERLE, and CROMPTON, Js.).—The general words are clearly enough.

Rule absolute.(*a*)

(*a*) See Rex *v.* The Churchwardens and Overseers of St. Martin in the Fields, 3 B. & Ad. 907 (E. C. L. R. vol. 23).

*232] *MARQUAND *v.* BANNER. *April* 21.

By memorandum for charter, made at Liverpool between plaintiff, as master for the owners of the ship S., and M. & Co., it was agreed that (excepting the cabin, state rooms, and room for stowage of cables, &c., and crew) the vessel should be immediately made ready, and take on board from the charterers (who were to have the full reach of the hold, from bulkhead to bulkhead, including the half deck) a full cargo of merchandise and specie, the owners employing sufficient hands for the purpose, and should proceed to Buenos Ayres, and there deliver cause the cargo in the usual and customary manner agreeably to bills of lading, and so end the voyage: in consideration whereof the affreighters to deliver the cargo alongside to be laden, and it to be received at the port of discharge in the usual and customary manner; and "pay for the use and hire of the said vessel, in respect of the said voyage," 775*l.* "lump sum, in full, charterers paying for landing the measurement portion of the cargo, or 850*l.* in full, the shipowners paying the lighterage, at charterers' option, to be decided before sailing from L.:" payment to be made by the captain receiving "such freight as the charterers may have payable abroad as per bills of lading, not exceeding half, or by an order handed over to him by the charterers, at their option, at the current rate of exchange, which order is to be payable at the port of discharge; and the balance to be paid by the charterers' acceptance, payable in

London, at three months date from the day of sailing." The charterers to name the lumpers and stevedores for taking in cargo and stowing; the ship to pay the lumpers, the charterers the stevedores, both to be under the direction of the master, and owners to be responsible for improper stowage: such goods only as the charterers might direct to be received on board. "That the master shall, at the charterers' request, sign bills of lading in the usual and customary manner, and at any rate of freight that may be filled up and made payable in any manner the charterers may choose, without prejudice to this charter." The vessel to be consigned to her charterers' agents at her port of discharge.

The charterers put up the S. as a general ship: plaintiff, as master, signed bills of lading at such freight and payable in such manner as they requested. They elected to pay the 850*l.* Part of the bills of lading made 244*l.* 5*s.* 2*d.* payable at B. A.: and this plaintiff received at B. A. The rest of the bills of lading, made the freight payable "here" (Liverpool) as per margin; by the margin, it was to be paid one month after sailing, ship lost or not lost: it was not specified to whom the payment was to be made. The charterers paid a small part of the balance of the 850*l.* in cash, and, for the rest, gave their acceptance at three months, payable in London. Before maturity, they suspended payment. Plaintiff then claimed from the shippers the portion of the bill of lading freight not yet paid; the charterers also claimed it. The plaintiff himself was one of the owners.

On a case stated, with power to the Court to draw inferences of fact: Held, that the plaintiff was not entitled to claim from the shippers the freights last mentioned, he having signed the bills of lading in the character only of agent for the charterers, and there being no contract between the shipowners and the shippers.

THIS was a special case stated for the opinion of the Court, without pleadings, in pursuance of an order of Erle, J.

The plaintiff, Hilary Marquand, being at the time master and principal owner of the ship Secret, on 15th December, 1854, entered into the following charter-party *with Messrs. Millers & Thompson, ship- [*233
brokers, of Liverpool.

"Liverpool, 15th December, 1854.

"Memorandum for charter.

"It is this day agreed between Captain Hilary Marquand, for owners of the good ship or vessel called The Secret," &c., "whereof said H. Marquand is master, of the one part, and Messrs. Millers & Thompson, freighters or charterers of the said vessel, of the other part: witnesseth(*a*) that it is agreed that (the cabin and state rooms," and room for stowage of cables, &c., and crew excepted) "the said vessel shall be immediately made ready and receive and take on board from the said charterers (who are to have the full reach of the vessel's hold from bulkhead to bulkhead, including the half deck) a full and complete cargo of lawful merchandise and spice, including 100 tons dead weight if required by the charterers, the owners employing sufficient hands for that purpose: and thereupon, on being despatched, shall proceed to Buenos Ayres, and there, or so near thereto as she can safely get, deliver the said cargo in the usual and customary manner, agreeably to bills of lading, and so end the voyage. In consideration whereof the said affreighters shall deliver alongside the cargo to be laden on board the said vessel, and shall receive or cause the same to be received at her port of discharge, in the usual and customary manner, and shall and will pay for the use and hire of the said vessel, in respect of the said voyage, the sum of 775*l.*, lump sum, in full, charterers paying for landing the measurement

(*a*) Sic.

portion of the cargo, or 850*l.* in full, the shipowners paying the lighter-
*234] age, at charterer's option, to be decided before *sailing from Liverpool: payment to be made as follows: viz., the captain to receive such freight as the charterers may have payable abroad as per bills of lading, not exceeding half, or by an order handed over to him by the charterers, at their option, at the current rate of exchange, which order is to be payable at the port of discharge; and the balance to be paid by the charterers' acceptance, payable in London, at three months' date from the day of sailing, or in six weeks after sailing, in approved bills, or cash, equal to cash in three months from sailing, at the owners' option: and the said charterers shall be allowed, for the purpose of loading the said vessel, thirty running days (Sundays excepted), if not sooner despatched, to be computed from the arrival of the vessel at a proper place of loading in the Prince's Dock, having a clear hold, and being in readiness to load, notice thereof being given in writing to the said charterers: and, for every day the said vessel shall be detained beyond that time by the said charterers, demurrage shall be paid by them at the rate of 4*l.* per day, but to cease on the charterers' despatches being left on board the vessel, or tendered by them to the captain: and, should the vessel be detained by contrary winds when the lay days have expired, or by other causes over which the charterers have no control, she is to take in goods without the payment of demurrage. And it is agreed that the charterers shall have the option of naming the lumpers and stevedores who are to take in and stow the cargo; and the ship is to pay the lumpers 12*d.* per ton; and the charterers will pay the stevedore or stevedores for assisting to stow the cargo: but it is expressly agreed
*235] that the lumpers and *stevedores shall be under the direction of the master, and the owners of the vessel responsible for improper stowage. That such goods only as the charterers may direct shall be received on board the said vessel; for which the mate shall give a receipt when tendered alongside; and no goods to be received in the cabin or any part of the vessel without the consent of the charterers. That the master shall, at the charterers' request, sign bills of lading in the usual and customary manner, and at any rate of freight that may be filled in and made payable in any manner the charterers may choose, without prejudice to this charter: and that he shall attend at the brokers' office at least twice each day after the loading shall commence, for the purpose of signing such bills of lading. That, should it be necessary for the said vessel to take in dunnage or ballast, the same to be provided by the owners, and the latter to consist of copper, dross or stones. That the vessel shall be consigned to the charterers' agents at her port of discharge, the owners paying the customary commission. That the vessel shall not be chartered in this country for the return voyage without the consent of the present charterers. The charterers to have the option of putting a full cargo in the fore cabin if required by them

but, if reserved for passengers by the owners, the space to be measured and allowed off the chartered freight at pro ratâ rate. It is also further agreed that the said vessel shall by the owners thereof, during the whole of the said voyage, be kept tight, staunch, and strong, and well found and provided with men and mariners sufficient and able to navigate the said vessel, and with all manner of rigging, boats, tackle, provisions, and appurtenances whatsoever; *restraint of princes," &c., "always excepted. And lastly, for the due performance of the agreements and matters herein contained, each of the said parties bindeth himself and themselves to the other in the sum of 800*l*. As witness the hands of the said parties. The ship, on her return to Liverpool, to be consigned to P. H. Dean & Co., or to their agents, at her port of discharge." [*236

(Signed) HILARY MARQUAND. MILLERS & THOMPSON.

After the charter was made, the vessel was loaded by the charterers as a general ship; and the plaintiff, as master, signed the bills of lading presented by the charterers at such rates of freight and payable in such manner as they requested.

The charterers elected, before the vessel left Liverpool, to pay the 850*l*. mentioned in the charter-party. Out of the freights reserved by the bills of lading the sum of 244*l*. 5*s*. 2*d*. was made payable at Buenos Ayres, and no more: and this left a sum of 605*l*. 14*s*. 10*d*. to be paid by the charterers to the shipowners in England in the manner mentioned in the charter. The remaining freights, made payable by the bills of lading, were to be paid in England; and the following is a copy of one of the bills of lading by which freight was made payable in England.

"Shipped, in good order and condition, by Roger Best & Co., of Liverpool, in and upon the good ship or vessel called The Secret, whereof Marquand is master for this present voyage, and now lying in the port of Liverpool, and bound for Buenos Ayres, five bales of merchandise, being marked and numbered as per margin, and to be delivered in the like good order and condition at the aforesaid port of Buenos Ayres (all and every the *dangers and accidents of the seas and navigation of whatsoever nature and kind excepted), unto John Best & Brothers, or to their assigns, freight for the said goods paid here as per margin with average accustomed. In witness whereof the master or purser of the said ship or vessel has affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the rest to stand void. Dated in Liverpool, this 11th day of January, 1855. [*237

[Marks and numbers; the charge, with primage, being 3. 13. 6.]

"Freight to be paid one month after sailing, the vessel lost or not lost."

"Weight and contents unknown to Hilary Marquand."

"Measurement goods only to be landed into the Custom House; de-

posit stores by consignees of the ship at ship's expense, but shipper's risk, including the responsibility of lightermen."

The other bills of lading, by which the freights were made payable in England, were in similar terms.

On 17th January, 1855, the vessel sailed from Liverpool on her voyage to Buenos Ayres: and, on the following day, Messrs. Millers & Thompson, by the authority of the plaintiff, and in accordance with his option in that behalf, paid the above-mentioned sum of 605*l.* 14*s.* 10*d.* to Messrs. P. H. Dean & Company, his agents, in the following manner: viz. the sum of 24*l.* 1*s.* 2*d.*, part thereof, in cash, and the remainder by their acceptance of his draft on them for 581*l.* 13*s.* 8*d.*, dated 17th January, 1855, and payable in London at three months' date, as provided in the charter-party.

On receiving this acceptance, Messrs. P. H. Dean & Company gave to Millers & Thompson a receipt, of which the following is a copy.

"Liverpool, 18th January, 1855.

"Received from Messrs. Millers & Thompson their acceptance to
*238] Hilary Marquand's draft for 581*l.* 13*s.* 8*d.*, *in favour of Bonamy & Marquand, due 20th April, 1855, being balance of outward charter Secret hence to Buenos Ayres.

"581*l.* 13*s.* 8*d.*" "P. H. Dean & Co.

"Per E. O. Keefe."

The above-mentioned bill of exchange was never negotiated; and it still remains in the hands of the plaintiff unpaid.

On 23d January, 1855, Messrs. Millers & Thompson suspended payment, and on 19th February following executed a general assignment of their property for the benefit of their creditors. On 13th February, 1855, Messrs. P. H. Dean & Co., the agents of the plaintiff, gave notice to the shippers of the goods that they must not pay the freights payable under the bills of lading to Messrs. Millers & Thompson, and that such freights were to be paid to the plaintiff. The trustees of the estate of Messrs. Millers & Thompson also claimed these freights from the shippers. On 13th March, 1855, the vessel arrived in Buenos Ayres; and the plaintiff, as master of the vessel, received from the consignees, under the bills of lading, the 244*l.* 5*s.* 2*d.*, being the amount which was made payable by the bills of lading in Buenos Ayres. The plaintiff, also, having received notice that Messrs. Millers & Thompson had stopped payment, and that the residue of the 850*l.* payable under the charter-party, and the freights payable in England under the bills of lading, were unpaid, endeavoured to stop the goods for the unpaid freights; and he succeeded in collecting about 15*l.* from two of the consignees: but the other consignees refused to pay; and the plaintiff ultimately delivered the whole of the cargo to the persons holding the
*239] bills of lading without receiving any freight from *them beyond the 244*l.* 5*s.* 2*d.* and 15*l.*, making together 259*l.* 5*s.* 2*d.* No

part of the 850*l.* made payable under the charter has been paid, except so much as has been satisfied by the 24*l.* 1*s.* 2*d.* received in Liverpool, and the 259*l.* 5*s.* 2*d.* received at Buenos Ayres. Messrs. Millers & Thompson, before their failure, had received some part of the freights payable in Liverpool, although the same were not due until one month after sailing of the ship.

By the consent of all parties interested, it was agreed that the defendant should receive from the shippers of the goods the residue of the freights which were by the bills of lading made payable in Liverpool; and that the defendant should pay the amount so received to the plaintiff if the plaintiff was under the circumstances above stated entitled in point of law to require that the freights, which were by the bills of lading made payable in Liverpool, should be paid to him: and the defendant has accordingly received the sum of 400*l.* from shippers of goods.

The question for the opinion of the Court is: Was the plaintiff, under the circumstances above stated, entitled to require that the freights which were unpaid at the time of the stoppage of Messrs. Millers & Thompson, and which were by the bills of lading made payable in Liverpool, should be paid to him.

If the Court is of opinion that he was so entitled, judgment is to be entered for the plaintiff for 400*l.* And, if the Court is of opinion that he was not so entitled, judgment is to be entered for the defendant.

The Court is to be at liberty to draw any inference of fact which a jury might and ought to draw.

**Mellish*, for the plaintiff.—The contract which the shipper makes is with the shipowners, whether there be a bill of lading or not: the master, in signing the bill of lading, acts as the shipowners' agent. If he received the freight from the shipper, and were sued for it by the charterers, he would be entitled to set off the sum due from the charterers to the shipowners. Supposing the freights arising on the bills of lading to be less than that named in the charter-party, the shipowners could of course claim from the shippers no more than the lesser sum. The convenience of allowing the shipowners to look to the shippers, and vice versâ, is obvious. If the goods be badly stowed, the shippers must have a remedy against the shipowners; their contract is independent of that made in the charter-party. It is true that such goods only as the charterers direct are to be received on board: that, however, affects only the contract as between the shipowners and the charterers. [ERLE, J.—The charter-party contemplates the ship being employed as a general ship.] It does so, undoubtedly. The master cannot be agent for both the shipowners and the charterers. It is true that, if the shippers had without notice paid the freight to the charterers, they would have been discharged: but the notice fixes them with knowledge of the rights of the shipowners. [WIGHTMAN, J.—The master [*240

is, by the charter-party, to sign bills of lading at any rate of freight that may be filled in, and made payable in any manner the charterers may choose, without prejudice to the charter. Could not the charterers have directed that the freight should be expressly made payable to themselves? CROMPTON, J.—If it had *been made payable to the shipowners, without the express assent of the charterers, would not that have been a breach of the agreement?] If the shipowners, on these bills, had sued the shippers for the freight, the shippers could have had no defence. Or a Court of equity, at the instance of the shipowners, would have required payment to the shipowners, in order to enable them to set off the freight due to them on the charter. Suppose the whole freight to have been payable at the port of discharge: the shipowners clearly, to the extent of the bills of lading, would have had a lien on the goods for the freight, and could claim no lien beyond, because the master is their agent; Mitchell *v.* Scaife, 4 Campb. 298. In Faith *v.* The East India Company, 4 B. & Ald. 630 (E. C. L. R. vol. 6), it was held that the master could not, by signing bills of lading for "freight agreeable to freight bill," contrary to express directions of the shipowner, destroy the shipowner's lien on the goods: this shows that the master is the agent of the shipowner.

*241]

Kemplay, contrà.—The shippers have entered into no contract with the shipowners, who have made over to the charterers the right of employing the ship on freight. In Mitchell *v.* Scaife, the question was only as to the lien of the shipowner on goods shipped on account of the charterer: it was not suggested that a party, not the charterer, shipping goods in the chartered ship had contracted with the shipowner. The bill of lading here does not state to whom the freight is to be paid: but it is manifest that the shipper contracts only with the party who is owner of the ship for the voyage, that *is with the charterers, who have put up the ship as a general ship; and the insolvency of the charterers can make no difference in this respect. A portion of the sum for which the charterers contract with the shipowners is indeed to be paid to them by the master receiving abroad such freight as is payable abroad: that is a matter between the charterers and the shipowners; the claim against the shippers could be made by the charterers only. If the vessel had been lost in her voyage, no freight would have been earned from the shippers: the transaction between the charterers and the shipowners would have been completed by the payments made by the charterers in England. [CROMPTON, J.—If, by accident, no bill of lading had been signed, the party to sue for the freight would have been the charterers.] Clearly so; the charterers determine what goods are to be received, and at what rate. A mere statement in the bill of lading that the freight had been paid would, though the freight had not in fact been paid, have bound the charterers as against the assignee of the bill, on the ground that the captain signed the bill as

*242]

agent of the charterers; Howard *v.* Tucker, 1 B. & Ad. 712 (E. C. L. R. vol. 20). And indeed it might be said here that there is no contract in terms by the shippers to pay the freight, even with the plaintiff as master, but only a statement that the freight is to be paid at Liverpool; at any rate, if there be such a contract, it is with the plaintiff as master and agent of the charterers only. The shipowners might have detained goods shipped on account of the charterers themselves, but not goods shipped, through the charterers, on account of other parties; Tate *v.* Meek, 8 Taunt. 280 (E. C. L. R. vol. 4). Parish *v.* Crawford, 2 Stra. 1251;(*a*) *no doubt, appears to be an authority against the defendant. There the owner of a ship chartered her to F., who was to have [*243 the freight of the goods; and F. having taken goods on board and not having delivered them, it was held that the shipowner was liable to the shipper. But that case must be considered to be overruled by James *v.* Jones, 3 Esp. N. P. C. 27,(*b*) and Mackenzie *v.* Rowe, 2 Camp. 482. When a ship is chartered, so exclusively is the charterer the owner pro hâc vice that the assent of the shipowner to an act otherwise barratrous does not prevent the act from being barratrous; Vallejo *v.* Wheeler, 1 Cowp. 143, 153. It does not, indeed, appear from the report of that case what were the terms of the charter-party. But the same principle was affirmed in Soares *v.* Thornton, 7 Taunt. 627 (E. C. L. R. vol. 2), where the terms of the charter-party appear to be analogous to those in the present case: and there the barratry consisted in an act done by the shipowner himself. On the other hand, if the act be done in obedience to the order of the charterer, there is no barratry; Hobbs *v.* Hannam, 3 Camp. 93. Finally, in Colvin *v.* Newberry(*c*) it was held that an instrument, though containing no express words of demise, whereby B., the master of the ship, took the ship into his service, and acquired generally the dominion over it, made B. the owner to such an extent that the shipowner was not liable for the non-delivery of goods shipped, by parties cognisant of the contents of the instrument, *under bills of lading signed by B. Major *v.* White, 7 C. & P. [*244 41 (E. C. L. R. vol. 32), and Boucher *v.* Lawson, Ca. Temp. Hard. 85, 194, show the same principle.

Mellish, in reply.—Some of the cases cited were not decided upon an ordinary charter-party. In Colvin *v.* Newberry, 1 Cl. & F. 283, the instrument was in the nature of a demise for time. Many of the other cases are earlier than Hutton *v.* Bragg, 7 Taunt. 14 (E. C. L. R. vol. 2), where it was assumed that a letting to freight was in the nature of a demise. But it is now considered that the charter-party is rather a

(*a*) More fully in Abbott on Shipping, 31 (10th ed.

(*b*) More fully in Abbott on Shipping, 32 (10th ed.

(*c*) In Dom. Proc. 1 Cl. & F. 283, affirming the judgment of Exch. Ch. in Newberry *v.* Colvin, 7 Bing. 190 (E. C. L. R. vol. 20); S. C. 1 Cr. & J. 192;† which reversed the judgment of K. B. in Colvin *v.* Newberry, 8 B. & C. 167 (E. C. L. R. vol. 15). See Fenton *v.* The City of Dublin Steam Packet Company, 8 A. & E. 835 (E. C. L. R. vol. 35).

contract to allow the charterer to use the ship. [CROMPTON, J.—Look at the language of Lord Tenterden, in the House of Lords, in Colvin *v.* Newberry, 1 Cl. & F. 297, 8.]

WIGHTMAN, J.(*a*)—The question is whether the plaintiff, under the circumstances of this case, is entitled to require payment to himself of the freight payable under the bills of lading. That depends on the question whether the contract into which the master and shippers have entered is made by the master as agent of the charterers or as agent of the shipowners. Looking at the terms of the charter-party, I find it difficult to doubt that he is the agent of the charterers and not the agent of the shipowners. By the terms of the charter-party, the ship is let for a particular voyage, and the charterers are to pay the shipowners a lump freight for the whole voyage: and the master, at the request of the charterers, is to make bills of lading at any rate, and payable in

*245] any manner, the charterers may choose, without prejudice to *the charter. This therefore gives to the charterers the direct management as to the terms on which the bills of lading are to be signed. In fact the bills of lading are not signed in any manner compromising the rights of either party; for all the freight now in question is to be paid in Liverpool, as per margin; and the margin specifies only that it is to be paid within a month of the ship's sailing, not specifying to whom it is to be paid, leaving thus open the question who is entitled to claim the freight, in other words, whose agent the master is. As far as the parties shipping the goods are concerned, there may be an unnamed principal, to whom they are to look. But, when it is once shown that the master was in fact acting for the charterers, and this is made known to the shippers, it appears to me that the charterers are entitled to recover the freight under the general authority which the shipowners have conferred upon them. Whatever might have been the result if the charter had not contained these terms, I think it clear that the charter here makes the charterers the parties entitled to the freight.

ERLE and CROMPTON, Js., concurred.

Judgment for defendant.

(*a*) Lord Campbell, C. J., had left the Court.

*THOMAS WILLIAM BRAMSTON, Esq., and CHARLES GRAY ROUND, Esq., Treasurers of the County of ESSEX, *v.* The Mayor, Aldermen, and Burgesses of the Borough of COLCHESTER. *April* 22.

[*246

By a local Act passed prior to stat. 5 & 6 Vict. c. 98, in furtherance of arrangements made between the justices of a county and the council of a borough, having a separate Court of Quarter Sessions, it was provided that the prisoners of the borough should be maintained in the county gaol on certain terms.

Held, that this Act was not a special contract within the meaning of stat. 5 & 6 Vict. c. 98, s. 16; and that the local Act, being inconsistent with the general enactment, was repealed by it, though not expressly mentioned.

THE following case was stated for the opinion of this Court, without pleadings, by consent and by the order of Coleridge, J.

An additional gaol for the county of Essex was erected in, or soon after, the year 1822, under the provisions of stat. 1 & 2 G. 4, c. cii.(*a*) Before the passing of the said Act, and when the bill for that Act was being presented, it was proposed that the boroughs in the said county, of which the borough of Colchester was one, should contribute to the county rate to be raised for the said additional gaol; which proposition was objected to on the part of the said boroughs, or some of them; and opposition was threatened to the said bill by divers parties interested in and offering such opposition, on behalf of the said boroughs or some of them: whereupon deputies from the parties who threatened such opposition, and a committee of the justices of the said county, conferred together on the subject, and on such conference agreed on the principles embodied in the clauses now forming sects. 28 and 29 of the said Act, 1 & 2 G. 4, c. cii., which clauses were upon the report of the said committee of justices assented to and *adopted by the justices of the said county in quarter sessions assembled: and the members of Parliament for the said county were requested to procure the insertion of the said clauses in the said bill: and the said clauses were inserted accordingly. The following are copies of the 28th and 29th sections of that Act. Sect. 28: "And whereas there are several boroughs, towns corporate, liberties, and other distinct jurisdictions within the county of Essex aforesaid, in which justices acting in the commission of the peace for the said county have no power or authority: and whereas the justices acting in and for the said boroughs, towns corporate, liberties, and other distinct jurisdictions, have frequently for a long time past committed offenders either charged with or convicted of offences committed within the limits of the said boroughs, towns corporate, liberties, and other distinct jurisdictions, to the county gaol for trial at the assizes of the said county of Essex, or after conviction on their trials had within such boroughs, towns corpo-

[*247

(*a*) Local and personal, public: "For building an additional gaol for the county of Essex, and for enlarging, improving, and altering the existing prisons for the same county."

rate, liberties, and other distinct jurisdictions, and doubts having arisen respecting the authority for such commitments to the county gaol; be it further enacted, That from and after the passing of this Act it shall be lawful for the justices acting in and for the said boroughs, towns corporate, liberties, and other distinct jurisdictions respectively, to commit to the said county gaol offenders charged with or convicted of offences committed within the limits of such boroughs, towns corporate, liberties, and other distinct jurisdictions." Sect. 29: "And be it further enacted, that from and after the passing of this Act, the treasurer or treasurers of the said county of Essex shall, and he and they is and are hereby respectively authorized to demand and receive of and from *the treasurers or other officers who shall receive the rates or levies collected within and for such boroughs, towns corporate, liberties, and other distinct jurisdictions respectively, such sum and sums of money as the justices of the said county of Essex shall, at the quarter sessions to be holden by them next after the close of Easter in each year, determine to be double the average amount of expense per diem of feeding and clothing a prisoner in their county gaol, for each and every day any offender charged with or convicted of any offence committed within the limits of the said boroughs, towns corporate, liberties, and other distinct jurisdictions respectively, shall be confined or imprisoned under such commitments as before mentioned in the said county gaol; and for the recovery thereof the treasurer or treasurers of the said county of Essex shall have the same remedy and remedies against the treasurers and other officers of the said boroughs, towns corporate, liberties, and other distinct jurisdictions respectively, as he or they now have for recovering or enforcing the payment of the county rate from any parish of the said county; and the said treasurer or other officer, who shall receive the rates or levies collected within and for the aforesaid boroughs, towns corporate, liberties, and other distinct jurisdictions respectively, is hereby required to pay the same accordingly out of the said rates or levies: Provided always, that nothing in this Act shall be construed to alter in any way any existing law or statute as to the general liability to assessment to the county rates of any of the said boroughs, towns corporate, liberties, and other distinct jurisdictions, or in any way to abridge or alter their peculiar rights and privileges." The whole of the said Act is to be considered as part of this case; and any *part of it may be referred to by either party. The borough of Colchester above mentioned is the borough named by that name in schedule (A.)(*a*) to the Municipal Corporation Act, 5 & 6 W. 4, c. 76. From the time of the erection of the additional gaol down to the present time, both before and after the passing of the general Gaol Act, 5 & 6 Vict. c. 98, persons committed for offences arising within the said borough have been sent to the said additional

*248]

*249]

(*a*) Sect. 1.

prison of the county of Essex (being the county in which the said borough is situate); and there has not been, before or since the passing of stat. 1 & 2 G. 4, c. cii., any special contract subsisting between the said borough and county relating to the said prisons, unless the agreement, under which section 28 and 29 were inserted in the Act as hereinbefore stated, constituted such contract; but such prisoners have been from time to time paid for on the terms provided by the said last-mentioned Act. A separate court of sessions of peace was granted to the said borough before the passing of the said statute 5 & 6 Vict. c. 98.

The justices of the county now claim to be paid for the expenses of borough prisoners under the provisions of stat. 5 & 6 Vict. c. 98, s. 18; and the present action is brought to recover a sum of 500*l.*, being an amount claimed by the said county from the said borough for prisoners under and according to the said 18th section; and in that amount is included a sum of 100*l.* for interest on and instalments of money borrowed by the county, in the years 1846 and 1847, for alterations, additions, or improvements in or to the said gaol. The demand is objected to by the defendants in toto: First, *on the ground that the payment to be made by the said borough in respect of prisoners ought to be regulated by the said Act of 1 & 2 G. 4, alone; or, if not so, then: Secondly, as to the 100*l.* (part of the said sum of 500*l.* claimed), on the ground that the said sum of 100*l.*, being for interest and instalments of money borrowed as aforesaid, is a sum which the justices of the county are not entitled, under the 18th section of stat. 5 & 6 Vict. c. 98, to compute and charge against them. If the Court is of opinion that the defendants are right on their first ground of objection, then judgment is to be entered for the defendants. If the Court is of opinion that the defendants are wrong on their first, but right on their second, ground of objection, then judgment is to be entered for the plaintiffs for the sum of 400*l.*: but, if the Court is of opinion that the defendants are not right on either of their said grounds of objection, then judgment is to be entered for the plaintiffs for the sum of 500*l.*: but without costs in either judgment. [*250

Sir *Fitzroy Kelly*, for the plaintiffs.—The questions mainly depend on the construction of stat. 5 & 6 Vict. c. 98, s. 18, which enacts "that in every borough to which a separate Court of Sessions of the peace hath been or shall hereafter be granted or purported to be granted, and where the persons committed for offences arising within such borough, have been or shall hereafter be sent to any prison of the county in which such borough is situated, and that no special contract shall be subsisting between such borough and county relative to the said prisoners, the council of such borough shall pay" to the county the expenses, including in such expenses "all expenses of repairs, alterations, additions, and improvements in or to *the said prison." The first question is, Whether there is a special contract subsisting between the [*251

borough of Colchester and the county of Essex within the meaning of the clause. Local Acts of Parliament are sometimes called contracts sanctioned by the Legislature; and the phrase is very properly used to express an analogy by which they are to be construed; but in stat. 5 & 6 Vict. c. 98, s. 18, the contracts in contemplation of the Legislature were real contracts made under the Gaol Acts; Regina *v.* Mayor of New Sarum, 2 E. & B. 654 (E. C. L. R. vol. 75). Then the second question is whether the interest of the money necessarily or properly borrowed to repair the prison is to be included in the expenses of repairs.

Bovill, contrà.—Stat. 1 & 2 G. 4, c. cii., was passed to give effect to the agreement by which the rights of the borough and the county as to the gaol were to be settled. [Lord CAMPBELL, C. J.—In one sense no doubt there was a contract between the borough and the county. But in construing the local Act we cannot look to the preliminary negotiations; and we can scarcely call the Act itself a special contract.] Perhaps not: but the special Act was not repealed in terms by stat. 5 & 6 Vict. c. 98: and general affirmative words in a subsequent Act do not prevail over special provisions in a previous Act; Williams *v.* Pritchard, 4 T. R. 2, Lyn *v.* Wyn, Bridgman, 122, 127, Co. Litt. 115 a, Gregory's Case, 6 Rep. 19 b. [Lord CAMPBELL, C. J.—In all cases the statute must be construed according to what appears to be the intention of the Legislature. In this case we must see whether the intention was to
*252] establish a uniform system except only where there were special *contracts, or to except local Acts also.] In ascertaining the intention of the Legislature the general rules for the construction of statutes are important: it is with reference to these that statutes are framed. Sect. 15 shows that there was no intention to repeal local Acts under which gaols had been constructed; for if such Acts were repealed the borough would in such cases be bound to erect another gaol. [ERLE, J.—Is it not possible to read sects. 15 and 18 together thus?—The borough shall have a gaol, unless the prisoners are maintained elsewhere: and, if they are maintained elsewhere, it shall be on the terms in sect. 18 unless there be a special contract subsisting.] There are no words to repeal the previous Acts. [CROMPTON, J.—It would seem to require words to save them. Your argument reads the enactments with an interpolation "except where existing Acts of Parliament regulate the gaols." Lord CAMPBELL, C. J.—The argument must be that such an exception is implied.] The minor question is, whether the 100*l.* is part of the expenses of repairing. It is a bygone matter, which should have been paid for at the time.

Sir *F. Kelly*, in reply.—The repairs were in the years 1846 and 1847, after stat. 5 & 6 Vict. c. 98 was law; and the 100*l.* is not, as the parties are agreed, interest on a loan, but a proportion of one of the

instalments by which it was at the time agreed that the money should be repaid.

Lord CAMPBELL, C. J.—I am of opinion that judgment must be given in favour of the county. Looking at stat. 5 & 6 Vict. c. 98, s. 18, it is evident that *the special contracts there referred to are actual contracts made under the provisions of the Prison Acts, and that the words of the exception in the enactment do not include Parliamentary enactments. On that point I never doubted. But Mr. *Bovill* argued that, irrespective of that exception, the local Acts are not repealed by the general Act, 5 & 6 Vict. c. 98. But, applying the just rules of construction to this Act, it seems to me that it was intended to repeal such local Acts. We must look to the whole enactment: and, doing so, I think it appears to have been the intention of the Legislature to sweep away all local peculiarities, though sanctioned by special Acts, and to establish one uniform system, except in so far as there are express exceptions. Reading sect. 18, it appears in express terms to apply to every borough having a separate Court of Sessions of the peace, where the prisoners are sent to the prison of the county, and there is no special contract subsisting. Colchester is such a borough; and it is clear that there is no special contract. The meaning of the enactment being clear, I do not inquire whether the consequences are desirable or not. The cases cited do not, I think, affect this case. In all the statutes there construed, the intention may well have been not to extend the general enactment to cases already provided for. Here the intention appears to have been to extend it. [*253

Then as to the 100*l.* When we find it an expense incurred in repairing the gaol, after the Act came into operation, it is fit it should be borne as part of the repairs.

WIGHTMAN, J.—I am clearly of opinion that a local *Act is not a special contract within the meaning of this Act. As was said in the judgment in Regina *v.* Mayor of New Sarum, 2 E. & B. 667 (E. C. L. R. vol. 75), it would be doing violence to the language of stat. 5 & 6 Vict. c. 98, to consider it one. And, as to the point that the special Act is not expressly repealed, it seems to me that it was intended to make one general law, superseding all local laws as to prisons, and repealing all local Acts. And therefore I think stat. 5 & 6 Vict. c. 98, s. 18, is the governing enactment. [*254

As to the 100*l.*, as soon as it appears that it is the borough's part of the expense of enlarging the gaol after the Act, there is no question.

ERLE, J.—It is clear to my mind that this case is within the general enactment, and not within the exception; for there was no special contract. I also agree that the intention of the Legislature was to repeal all special usages as to particular gaols, whether depending on local customs, or on local Acts. There was good reason for this, as the

boundaries of boroughs had been recently altered, and it was convenient to make one general law for all boroughs.

The 100*l.*, as explained, is part of the expense of repairs.

CROMPTON, J., concurred. Judgment for plaintiff.

---

*255] *BOWES, HUTT, WOOD, and PALMER *v.* CROLL.

April 25.

Declaration stated that, by contract between plaintiffs and defendant, defendant agreed to procure, as soon as possible and within four months from the making of the contract, sufficient land for a communication between a certain railway and certain gas works, and stowing a certain quantity of coals, "and to grant a lease of the same land to plaintiffs for a term of five years from the date of the said contract," determinable at the end of three years "of the said term" by notice from plaintiffs, which notice never was given; that plaintiffs should pay to defendant for the land half-yearly an annual rent equivalent to 4 per cent. on the money paid by defendant for the purchase, the first payment to be made six months after possession of the land should be given to plaintiffs, from which time only the rent was to run: and that, "upon the termination of the said term of five years, by effluxion of time or by notice," defendant should pay to plaintiffs all the moneys expended by them for laying down sidings for the communication, and building sheds and erections on the land for the purposes mentioned in the contract (less 5 per cent. for deterioration). Allegation: that, in part performance of the contract, defendant procured the land and put plaintiffs into possession; and that plaintiffs occupied and enjoyed the land from that time "until the termination of the said term of five years as hereinafter mentioned;" and, during the term they so occupied, &c., did, pursuant to the contract, expend money for laying down sidings, &c.; "that the said term of five years has expired and terminated, to wit, by effluxion of time;" that all things necessary had happened to entitle plaintiffs to receive from defendant, and render defendant liable to pay, the money expended (less, &c.): but defendant had not paid.

Plea: "That no lease of the said land was ever granted to the plaintiffs by the defendant, pursuant to the said agreement; nor did the said term of five years in the said agreement mentioned and contemplated ever come into, or have, any existence.

On demurrer: Held a bad plea. For that the granting of the lease by defendant was not a condition precedent to his liability to repay the money; and the meaning of the word "term" was not, in the agreement, restricted to a term created by lease, but included a period of five years during which the plaintiff should occupy, after being put into possession under the contract.

THE first count of the declaration charged that a certain contract or agreement was made and entered into, in writing, by and between plaintiffs and defendant, by which, among other things, defendant contracted and agreed with plaintiffs to procure as soon as possible, and within not exceeding four months from the making of the said contract, such a sufficient quantity of land as might be required for the means of communication between a certain railway, to wit, The East and West India Docks and Birmingham Junction Railway, and certain gas works, to

*256] wit, The Great Central *Gas Consumers' Company's works, at Bow Common, in Middlesex, and for stowing at least 15,000 tons of coals near those works, and to grant a lease of the same land to plaintiffs for a term of five years from the date of the said contract, to wit, from the 6th day of September, 1850, determinable at the end of the first three years of the said term by the plaintiffs, upon giving a certain notice in the said contract in that behalf mentioned, but which

notice never was given: and it was in and by the said contract further declared and agreed, by and between plaintiffs and defendant, that plaintiffs should pay to defendant for the said land half-yearly a rent which would be equivalent to 4*l.* per cent. per annum upon the money which should be paid by the defendant for the purchase of the freehold of the said land, the first payment of such rent to be made six months after possession of such land should be given to plaintiffs; from which time only the said rent was to run. And, by the said contract, it was further agreed, by and between plaintiffs and defendant, that, upon the termination of the said term of five years, by effluxion of time or by notice, defendant should and would pay to plaintiffs all the moneys expended by them for the purpose of laying down sidings necessary for such communication as aforesaid, and erecting and building the necessary coal-sheds and erections on the said land, to wit, the coal-sheds and erections necessary for the purposes in the said contract mentioned, less 5*l.* per cent. per annum for deterioration in value. Averment: that afterwards, to wit, in pursuance and part performance of the said contract, defendant procured the quantity of land required for the purposes aforesaid, and caused the plaintiffs to be, and accordingly the plaintiffs were, put *into possession of it. That plaintiffs occupied and enjoyed the said land, from the time when they were so [*257 put into possession of it, for a long space of time, to wit, until the termination of the said term of five years as hereinafter mentioned. That, during the time they so occupied and enjoyed the said land, they did, pursuant to the said contract, expend a large sum of money in and about and for the purpose of laying down the said sidings in the said contract mentioned, and in and about and for the purpose of erecting and building the said coal-sheds and erections in the said contract mentioned. That the said term of five years has expired and terminated, to wit, by effluxion of time. And that all things necessary have happened and been done to entitle plaintiffs to receive from the defendant, and to render him liable to pay to them, the said sum of money so expended by them as aforesaid, less 5*l.* per cent. per annum for deterioration in value. That the moneys so expended by plaintiffs as aforesaid, after making the said deduction of 5*l.* per cent. per annum, amount to a large sum, to wit, 2869*l.* 6*s.* 1*d.* Nevertheless defendant, although often requested so to do, has not paid to plaintiffs the said last-mentioned sum of money, or any part thereof, and wholly refuses to pay the same or any part thereof.

Plea (4th), to first count. That no lease of the said land was ever granted to the plaintiffs by the defendant, pursuant to the said agreement; nor did the said term of five years in the said agreement mentioned and contemplated ever come into, or have, any existence.

Demurrer. Joinder.

*258] *Manisty*, for the plaintiffs.—The defence suggested by *the plea is that the granting of a lease by the defendant to the plaintiffs was a condition precedent to the right of the plaintiffs to recover from the defendant. But the agreement cannot be so construed. The question is as to the intention of the parties. The plaintiffs, for their own security, require that the defendant shall grant them a lease; but the rent runs, as against them, from the moment that they are put into possession. And the five years are to be calculated, not from the granting of a lease, nor even from the plaintiffs entering into possession, but from the date of the agreement: the liabilities therefore cannot be dependent upon the granting of the lease. A somewhat similar point arose in Wood *v.* The Copper Miners' Company, 14 Com. B. 428 (E. C. L. R. vol. 78). There the plaintiff had erected works on land of the defendants, who had advanced to him money towards the completion of the works; and they covenanted to grant him a lease of the land for twelve years at a peppercorn rent; and the plaintiff was to mortgage the same immediately to the defendants as a security for repayment in seven years; the plaintiff to purchase of the defendants all the coal he should use at the works "during the said term of twelve years," and the defendants (impliedly, as it was held) covenanting to supply a certain quantity of coal. To a declaration, alleging a breach of the covenant, by not supplying the coal, defendants pleaded that no lease had been granted by them to the plaintiff. The plea was held bad on demurrer: the Court saying that the lease was mainly for the benefit of the plaintiff; that "term" meant, not technically a term to be created by the intended lease, but a period of time; and that the granting of the lease was not a condition precedent. Yet there it might have been

*259] contended, more reasonably than *it can be contended here, that the granting of the lease was a condition precedent, inasmuch as the defendants were to take, by the mortgage of the interest which the lease was to create, a security for the repayment of the advances which they had made.

Bovill, contrà.—In that case the covenants were quite distinct: the lease was to commence at a day then past; the agreement to continue for twelve years from the date of the agreement. Suppose, in the present case, after the plaintiffs had entered and become tenants from year to year, they had given a six months' notice and had quitted the premises: could the defendant have been called upon to repay the money which the plaintiffs had expended under the new contract? The language of the contract makes the money payable "upon the termination of the said term of five years, by effluxion of time or by notice:" that must mean such time or notice as the proposed lease would make essential to the termination of the term. That, under such circumstances, the execution of a lease, giving to the parties the permanent rights and interests looked to by the agreement, is an essential part of the con-

sideration for the agreement, and that therefore the non-execution of the lease prevents the agreement from being enforced, appears from Swatman *v.* Ambler, 8 Exch. 72.† It is true that there the agreement, the breach of which was complained of, was to pay rent "during the said term:" but the decision must have been the same had the agreement been to pay money at the termination of the term. [ERLE, J.—I am not sure of that. A party holding for a long term has a *very different interest from that which he has when he holds on [*260 a contingency; and his liability to pay at the determination of his interest may well be different according to the interest which he takes.] That distinction is in favour of the defendant. The agreement here is to pay at the end of the term, not at the end of the possession. [WIGHTMAN, J.—Why did not the defendant grant a lease?] That does not appear. [CROMPTON, J.—We must take the plea most strongly against him: it is consistent with the plea that he refused to grant the lease.] He may be liable to an action for not granting it: but the question is whether the liability to pay, contemplated by the agreement, has ever arisen. [CROMPTON, J.—We should, I think, require strong language before we believed that an act to be done by the defendant was a condition precedent to his liability.] If a party to a submission to arbitration revokes the submission he is not liable to the performance of the award. [Lord CAMPBELL, C. J.—The Legislature has now made provision for the correction of that evil;(*a*) and it was an anomaly.] It might have been unjust to allow a party to revoke his submission: but, that being allowed, it was not anomalous to make such revocation an answer to an action on an award made after the revocation. [ERLE, J.—If a party is let in, under an agreement for a term, and, no lease being executed, he becomes tenant from year to year, then he is tenant under such of the stipulations of the lease as are consistent with a tenancy from year to year.] That surely would not comprehend an agreement to pay money at the end of the proposed term. That the execution of *the lease is essential to raise the liability as to [*261 matters connected with the interest in the lease appears from Soprani *v.* Skurro, Yelv. 18, and Pitman *v.* Woodbury, 3 Exch. 4:† and Humphreys *v.* Jones, 5 Exch. 952,† shows that the stipulations made with reference to one contract cannot be transferred to another. The defendant here must have relied upon the lease as the security for the rent for the five years: the mere occupation by the plaintiffs, during that time, was no such security: and it cannot be that, if the defendant's liability to pay the money was not produced by the plaintiffs occupying for four years and three hundred and sixty-four days, it could be produced by the occupation for one additional day. When the agreement is looked at, it appears that the term, to be created by the lease, might terminate in two ways, either by notice from the plaintiff de-

(*a*) See stat. 3 & 4 W. 4, c. 42, s. 39.

termining it at the end of three years, or by the efflux of five years. An interest so specially limited is very different from that enjoyed by five years' occupation.

Manisty was not called on to reply.

Lord CAMPBELL, C. J.—In all cases where the Court has to determine whether a particular stipulation constitutes a condition precedent, it must look at the intention of the parties as expressed in the agreement: and, if, upon looking at the agreement, the stipulation does appear to be a condition precedent, the party who has failed to perform it is not entitled to claim from the other party the performance of the agree-
*262] ment. The cases which have been cited give us but little assistance: *they establish principles which are not contested. The question here is whether it was the intention of the parties that, in the events which have happened, the plaintiffs should have a right of action against the defendant for the non-payment of the money. Now it appears to me that, upon this agreement, the parties did intend that, if the plaintiffs had possession for five years as tenants, then, although there should be no lease, they should, at the expiration of the five years, be entitled to demand payment of the money. We must remember that the execution of the lease was an act to be done by the defendant. If it had been an act to be done by the plaintiffs, it might have been said that they could not demand payment till they had done it: but it was an act that the defendant might at any time do proprio motu. If the defendant did not grant the lease, when he might, and allowed the plaintiffs to spend their money on the land, he cannot, I think, make his own nonfeasance an excuse for not repaying the plaintiffs. In some cases, it is true, the execution of a lease is essential, because without the lease it is impossible to say what the liability is. But here the liability is defined; and nothing in the lease could vary the defendant's liability at the end of the five years. Could the defendant, by withholding the lease, deprive the plaintiffs of the money they had laid out on the faith of the agreement? We must see what the parties intended at the time of the contract: we cannot make a contract for them. I think the meaning was that, if the plaintiffs were put into possession for five years, and laid out their money, they should, at the end of the five years, be entitled to be paid by the defendant. There must, therefore, be judgment for the plaintiffs.

*263] *WIGHTMAN, J.—I am of the same opinion. I think the meaning of the agreement was that the plaintiffs should have the occupation of the premises for five years, and, at the expiration of that time, were to receive payment of the money that they should have laid out. Although the technical word "lease" is introduced, that made a stipulation for an act to be performed by the defendant: as to his liability, it is not material whether the lease were granted or not: the essential thing was that the plaintiffs should occupy for five years.

That is certainly consistent with the justice of the case, as it appears by the agreement. It would be very hard if the defendant could turn round and say that he had not done an act which he ought to have done, and was therefore relieved from all liability. That result could never have been contemplated.

ERLE, J.—I also am of opinion that the plaintiffs are entitled to recover upon the agreement which is on the record. The defendant is to grant them possession for five years, and, at the expiration of the time, is to pay them the money. The plaintiffs have occupied for the five years, and have put fixtures on to the land; the term is expired; and they want the money. The defendant says, by the agreement I was to grant a lease, and the money was to be paid at the expiration of that lease. I am of opinion that the granting of the lease by the defendant was not a condition precedent. This falls within a class of cases which have repeatedly been before the Court, where parties stand to each other in the relation of landlord and tenant, upon the understanding that a lease is to be granted, but the lease not being granted, they go on in that relation for a long *time; so that the question [*264 is, how many of the stipulations which were to have been introduced into the lease remain in force. If the agreement had been for a ninety-nine years' lease, and one of the intended stipulations of the lease was that the tenant should build during the term, it is manifest that he could not be called upon to build while he held for an uncertain term. So, if there had been a stipulation that the tenant under the lease should repair, he would, if he held only from year to year, be bound only to tenantable repairs. The question always is, whether a stipulation is materially connected with the lease which has not been granted. I think that here the stipulation was not connected with the intended lease. The landlord's interest, according to the agreement, was not affected by the omission to execute the lease; and, moreover, the execution of the lease was a thing which he was to do himself; and at the end of the term he was bound to perform the agreement to pay the money, although he had omitted to execute the lease.

CROMPTON, J.—I also am of opinion that the execution of the lease by the defendant was not a condition precedent to his liability to pay the money. When the act, which is said to be a condition precedent, is an act to be done by the party who insists on its non-performance, strong words are wanted to justify such a construction, although, undoubtedly, there might be words which would have the effect of enabling a party to insist on his own non-performance. I disclaim acting on a general view of the justice of the case; for we cannot say that there may not be circumstances with which we are unacquainted: but we must collect the meaning of *the parties from the language [*265 of the agreement. I construe it to mean that, when the plaintiffs had occupied for five years, they were to have the money. It is

argued that they must occupy for a "term" of five years, and that this means a term created by a lease. I think that is a narrow construction. We have the authority of the Court of Common Pleas in Wood *v.* The Copper Miners' Company, 14 Com. B. 428, 467 (E. C. L. R. vol. 78), that, in a similar case, "the words 'term of twelve years' and 'term aforesaid'" "do not mean the term to be created by the lease, in the technical sense of the expression, but that the true meaning of the word 'term' there is 'period' or 'space of time.'" When the case was afterwards argued, on error, in the Exchequer Chamber,(*a*) that point was not disputed. Now, if we adopt that construction here, as we must do to carry out the intention of the parties, there is an end of the question. The stipulation is that a term is to be granted to the plaintiffs in order that they may have the security of the land, and that, if they put fixtures in it, they are to be repaid at the end of the time.

Judgment for the plaintiffs.

(*a*) See note (*a*) to Wood *v.* The Copper Miners' Company, 17 Com. B. 594 (E. C. L. R. vol. 79).

---

*266] *MACGREGOR *v.* C. H. RHODES, J. LANE, and C. H. R. RHODES. *April* 25.

Declaration charged that P. drew a bill of exchange payable to his own order, and endorsed it to defendant, who endorsed it to plaintiff; and that the bill was dishonoured, and defendant did not pay it. Plea, denying the endorsement to the defendant.

On demurrer:

Held, by Lord Campbell, C. J., Wightman and Erle, Js., that the plea was bad, the defendant being estopped, by his admitted endorsement, from traversing the endorsement to himself.

Dubitante Crompton, J.

THE first count of the declaration charged that, on 1st November, 1854, one G. E. Pinkney, by his bill of exchange now overdue, directed to one T. E. Lane, required the said T. E. Lane to pay to the order of the said G. E. Pinkney 1800*l*.,.six months after the date thereof; and the said G. E. Pinkney endorsed the same to the defendants, who endorsed the same to the plaintiff; and the said bill was duly presented for payment, and was dishonoured: of which the defendants had due notice, but did not pay the same. (There were other counts.)

Plea (1st), to the 1st count: "That the said bill was not endorsed to these defendants as alleged."

Demurrer. Joinder.

Phipson, for the plaintiff.—The defendants are not entitled to insist on the defence which the plea sets up. They do not deny their own endorsement to the plaintiff; and he has taken the bill on the faith of that endorsement. It is not suggested that the plaintiff has not given value to the defendants. [ERLE, J.—Do you say that the endorsement to the defendants is not essential to the negotiability of the bill?] As

between the present parties, the question of negotiability does not arise. [Lord CAMPBELL, C. J.—The bill requires payment to the order of *Pinkney: must you not show that there is such order giving you the right?] That must be done: but the defendants, by endorsing, admit that right. When the acceptor is sued, he admits only the handwriting of the drawer; and, therefore, the title derived from the drawer may be impeached by him. But that is inapplicable to the case of an action brought by an endorsee against his immediate endorser. On the effect of an endorsement, as admitting the prior endorsements, the authorities are uniform; Bomley *v.* Frazier, 1 Stra. 441, Lake *v.* Hayes, 1 Atk. 281, Heylen *v.* Adamson, 2 Burr. 669, 675, Lambert *v.* Pack, 1 Salk. 127, Critchlow *v.* Parry, 2 Camp. 182, and note to that case, Free *v.* Hawkins, Holt's N. P. R. 550 (E. C. L. R. vol. 3); Bayley on Bills, 463 (ed. 6); Byles on Bills, 118 (ed. 6); Chitty on Bills, 646 (ed. 9); Story's Commentaries on the Law of Bills of Exchange, sect. 111 (p. 125, ed. 1843). [ERLE, J.—Suppose the plaintiff to have endorsed to the defendants, and that they had endorsed over to him.] That would not, by the custom of merchants, entitle the plaintiff to sue the defendants; Britten *v.* Webb, 2 B. & C. 483 (E. C. L. R. vol. 9). But such a transaction cannot be presumed to have taken place here, in the absence of express allegation. [Lord CAMPBELL, C. J.—Assuming that, if issue were joined, the defendants, at the trial, would be bound conclusively as to the fact by their admission: does it follow that the plea is bad?] The two questions are really the same. It may be true that the bill came to the defendants without a genuine endorsement: but they, having endorsed, cannot set up this. [ERLE, J.—They might *perhaps be liable as drawers.] Intermediate endorsements need not be noticed at all. [CROMPTON, J.—But you must recover secundum allegata.] If the defendants are estopped from disproving the endorsement, the plaintiff cannot injure his claim by alleging it. In Chitty on Bills, 572 (9th ed.), it is said: "It has been decided, that in an action against the endorser of a bill of exchange, in which the declaration stated several prior endorsements, it is not necessary to prove any endorsements on the bill prior to the defendant's, though it is otherwise in an action against the acceptor; consequently, where a remote endorser is sued, there will be no risk in stating all the prior endorsements in the declaration." [CROMPTON, J.—There is no doubt as to that: but the question is whether the defendants may not traverse your allegation of endorsement.] In Armani *v.* Castrique, 13 M. & W. 443,† though the marginal note appears to state the law in favour of such a plea, there really was no decision on the point; but an amendment was suggested and made.

[*267] [*268]

Karslake, contrà.—The plaintiff has chosen to aver specifically how he has obtained a title to the bill; and therefore he has made the par-

ticular title traversable. Whether, on a traverse, the endorsement by the defendants would prove an endorsement to them is a very different question. In Sanderson *v.* Collman, 4 M. & G. 209 (E. C. L. R. vol. 43), it was held that the acceptor was estopped from traversing the fact of the drawing modo et formâ: but there the estoppel was replied, which ought to have been done *here if there be an estoppel. [Lord CAMPBELL, C. J.—What could the plaintiff do beyond repeating his own declaration?] He might reply that there were no intermediate endorsements, and that the name of the G. E. Pinkney appeared on the bill, as endorser. Or he might, in the declaration, have stated that the defendants endorsed a bill purporting to be drawn by G. E. Pinkney, and endorsed by him to the defendants, as suggested by Parke, B., in Armani *v.* Castrique, 13 M. & W. 449, 450.† [CROMPTON, J.—There may be an estoppel here as to all that appears on the bill: but I do not know what it is that does appear on the bill. WIGHTMAN, J.—In Armani *v.* Castrique, 13 M. & W. 451,† the Court say: "there can be no doubt, that if the matter of estoppel appears upon the pleadings, then it is not necessary to reply the estoppel, but the party may avail himself of it on demurrer."] It is, however, plain that the Court there held that the pleadings did not show the matter of estoppel, so as to bring the case within that rule.

*269]

Phipson, in reply, referred to Penny *v.* Innes, 1 C. M. & R. 439.†

Lord CAMPBELL, C. J.—I am of opinion that the plea is naught, and that the plaintiff is entitled to judgment. The declaration alleges that Pinkney drew a bill payable to his order and endorsed it to the defendants, and that the defendants endorsed it to the plaintiff, and that it was presented and dishonoured. The plea admits all these allegations except the allegation of the endorsement by Pinkney to the defendants. Are the defendants, *who admit that they endorsed to the plaintiff, at liberty to deny that Pinkney endorsed to them? The issue would be idle. Whether Pinkney endorsed to the defendants in blank or specially, the fact of the endorsement by the defendants would at the trial be conclusive evidence of Pinkney's endorsement to them, and would estop them from showing that what purported to be Pinkney's endorsement was a forgery. The request is to pay to the order of the payee: when a man endorses such a bill he undertakes that, if the party requested do not pay, he will; and he cannot deny that the payee has made the order. This is established by a long string of authorities. I cannot think that any replication was necessary to raise the estoppel. The plaintiff could reply only the matter already shown by the declaration; namely, that the defendants endorsed to him; and that is, of itself, an estoppel. The defendants having, when they handed the bill to the plaintiff, represented the title as a just one, cannot now deny that it is so. With respect to Armani *v.* Castrique, I should pay the most sincere respect to a decision of the Court of

*270]

Exchequer: but, as to what was said obiter on the suggestion of an amendment, I think it is not entitled to an equal consideration. My brother Parke appears to have recommended a new form of declaring, in all such cases, against the endorser, by alleging that the defendant endorsed a bill purporting to be endorsed to him by the party entitled to endorse: but he could hardly have meant that such a form was indispensable for raising the estoppel: at any rate, if he did, this *intimation would not be sufficient to impeach the authorities which have hitherto regulated the pleadings in such cases. [*271

WIGHTMAN, J.—The defendants admit that they endorsed a bill payable to the order of Pinkney; but they deny that Pinkney endorsed to them. I think they are not entitled to take such a traverse, and that the issue is immaterial. The plaintiff could not recover without an averment of Pinkney's endorsement; for that is essential to the negotiability. Some little doubt has been suggested from the expressions used in Armani *v.* Castrique: but nothing was said there sufficiently urgent to induce us to determine contrary to the authorities.

CROMPTON, J.—We are now for the first time deciding this point; for none of the authorities touch it. There are plenty of authorities to show that the estoppel must in the ultimate result prevail. But the question is, whether the defendants are estopped from traversing the mode in which the plaintiff alleges his title. He alleges that Pinkney endorsed to the defendants: and he must recover secundum allegata et probata. The question therefore is, not whether the defendants can dispute the plaintiff's right, generally, but whether they can dispute this peculiar right. I incline to think that they may. If they cannot, we should probably have found in the books some demurrer to such a plea. The plaintiff says that Pinkney endorsed to the defendants; *and he can prove this only by showing a special endorsement to them, or a blank one, by Pinkney. In cases of either sort of [*272 endorsements the holder may strike out intermediate endorsements, and declare on the endorsement of a single party. But there is another case, which gives rise to my doubt. Suppose the bill endorsed specially by several successive parties, and the declaration to trace the bill through all the endorsements. If the defendants are estopped here, they would be estopped from denying the steps necessary for tracing the bill in the case I have supposed. But I think that the estoppel goes no further than to prevent the defendants from saying that the plaintiff has no title, and not to the extent of preventing them from saying that he has not the particular title alleged.

My brother Erle, who has just left the Court, agrees with my Lord and my brother Wightman. Judgment for the plaintiff.(*a*)

(*a*) See Halifax *v.* Lyle, 3 Exch. 446.†

A party endorsing a promissory note impliedly affirms its genuineness, as well as that of all previous endorsements; and though his endorsee in de-

claring against him, may, in the usual form, allege the making of the note and its endorsement to the defendant, yet he cannot be required to prove it: Woodward *v.* Harbin, 1 Alabama, 104.

*273] *SAMUEL LUCKLEY BENSON *v.* HENRY ANDREW PAULL. *April* 26.

On demurrer to a declaration claiming a writ of mandamus to enforce the execution of a lease from the plaintiff to the defendant, in fulfilment of a contract between them,

Held, that the declaration was bad, as The Common Law Procedure Act, 1854, sect. 68, applies only to the fulfilment of such duties as might be enforced by the prerogative writ of mandamus, and not to the specific performance of contracts.

COUNT. For that by an agreement in writing, dated 25th May, 1855, and made between plaintiff and defendant, plaintiff agreed to let and defendant to take a house upon lease for the term of seven years from Midsummer then next ensuing; and it was further thereby agreed that a lease and counterpart should be prepared at the expense of the defendant, and should be executed within three months from the date thereof. And the plaintiff avers that it thereupon became the duty of the defendant to prepare such lease, or to accept a lease from him the plaintiff. Averments: that three months elapsed from the making of the agreement: that the defendant did not prepare such lease: that the plaintiff did prepare such lease, and tendered and offered it to the defendant for his acceptance. General averment of performance by plaintiff: that plaintiff is personally interested in the fulfilment of the said duty by the defendant: that the defendant has refused to fulfil the same, although the plaintiff demanded such fulfilment a reasonable time before this suit: and that the plaintiff has sustained damage by reason of the defendant's non-fulfilment of his said duty. And the plaintiff claims a writ of mandamus commanding the defendant to prepare a lease in accordance with the said agreement, or to accept the said lease so prepared by him the plaintiff as aforesaid.

Demurrer. Joinder.

*274] **Lush*, for the defendant.—The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), sect. 68, gives a plaintiff a right to claim a writ of mandamus "commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested." This, however, was intended to apply only to duties of such a nature that a prerogative writ of mandamus would lie to enforce them. The duty, if it may be so called, of specifically performing a contract is of a different kind; it cannot be enforced even in equity, except in particular kinds of contracts, and then only on proper terms. It is well known that in the original draft of The Common Law Procedure Act, 1854, were clauses giving the Courts of law power to order specific per-

formance of contracts, which clauses were struck out in the House of Lords. But, if the plaintiff is correct, the 68th section gives this power, and indeed a much more extensive one; and, besides, takes away all discretion in the Court, so that a Court of law not only may order the same specific performance as a Court of equity, but must order it, where a Court of equity would refuse.

Bovill, contrà.—There is a duty resulting from a contract. An action on the case lies for the breach of such a duty; Boorman *v.* Brown, 3 Q. B. 511 (E. C. L. R. vol. 43). [Lord CAMPBELL, C. J.—No doubt; though an action on the case could not be maintained for the breach of such a contract as this. But do you say that every promise, even a promise of marriage, may be enforced under sect. 68?] It may be difficult to maintain that.

Lush was not called on to reply.

*Lord CAMPBELL, C. J.—I am of opinion that the right to demand a mandamus for the fulfilment of a duty, under sect. 68, does [*275 not extend to the fulfilment of duties arising merely from a personal contract. If it did so, it would extend to every case of contract; for no doubt it is the duty of one who makes a promise to fulfil it. I do not give any weight to the history of the Act, or the alterations made in it when passing through the House of Lords. It certainly was the case that a clause giving the Courts of law power to order a specific performance was rejected, because it was thought not advisable to intrust them with that power; and, no doubt, it was not probable that those who denied that limited power intended to give a jurisdiction far more extensive than that which is exercised in equity: and on Mr. *Bovill's* construction the Act extends to duties arising from contracts such as could not be specifically enforced in equity. If we are bound to grant a writ of mandamus, ordering the fulfilment of the duty to perform this contract to execute a lease, we should be equally bound on the application of a lady to order a gentleman to fulfil his duty, and perform a promise which he had made to marry her. But, even if the obligation were confined to contracts of which equity would enforce the specific performance, there are many previous inquiries to be made, as, for instance, what the terms of the lease should be, and generally what arrangements are necessary to secure that equity is done by the enforcement of the contract. The Act gives us no means of making such inquiries. I think the enactment must be confined to such duties as might have been enforced by a prerogative writ of mandamus. The Act facilitates the obtaining of such a writ, and extends the power of *granting it [*276 to other courts as well as to the Queen's Bench. Within such limits, the power is likely to be very beneficial; but it would not be beneficial if it were extended to all duties arising from contract: and it was not the intention of the Legislature so to extend it.

WIGHTMAN, J.—I agree that the duty which may be enforced under

sect. 68 is not a duty merely arising from a contract. The construction of the Act as giving the word duty this very general meaning would lead to the consequences which my Lord has pointed out; and the omission of all machinery for regulating the exercise of such powers shows it was not the intention of the Legislature to grant them.

CROMPTON, J.—In addition to what has been said, I will only add that even the literal construction of the language of the Act shows that the duty spoken of is one in which it may be a question whether the plaintiff is personally interested. This is applicable to public duties, but wholly inapplicable to cases of pure contract, where he only is personally interested. Judgment for the defendant.

---

*277] *CHARLES COPELAND *v.* The NORTH EASTERN Railway Company. *April* 26.

The holder of shares in a railway company, whose Act incorporated the Companies Clauses Consolidation Act, 1845, conveyed the shares, along with much other property, by deed, in consideration of 10*s.* and the natural love and affection which he bore to his sister C., to a trustee in trust for her.

Held that this conveyance, though not a sale, was a transfer within the meaning of The Companies Clauses Consolidation Act, 1845 (7 & 8 Vict. c. 16), sects. 14, 15, 16, and not a transmission within sects. 18, 19; and, consequently, that the trustee was not entitled to be registered as holder of the shares without delivering the deed to the secretary to be kept by him, as provided by sect. 15.

FIRST count, reciting the passing of "The North Eastern Railway Company's Act, 1854,"(*a*) whereby, amongst other things, certain railway companies therein mentioned were dissolved, and their undertakings vested in The York, Newcastle, and Berwick Railway Company, of which the name was changed to The North Eastern Railway Company; and that, before that Act, one Edward Archer, since deceased, was the lawful holder of shares in The York, Newcastle, and Berwick Railway Company, and his name was duly registered in their registry book; and he was also owner of other shares in other companies; and by a deed of indenture, between Archer of the first part, the plaintiff of the second part, and Harriet, sister of Archer and wife of Anthony O'Flaherty, of the third part, Archer, for a nominal consideration of 10*s.*, and the natural love and affection he bore to his sister, granted, bargained, and sold to the plaintiff, his heirs and assigns, certain lands, in trust for Archer for life, and then for the separate use of Mrs. O'Flaherty; and also, for the same consideration, Archer gave, granted, transferred, assigned, and made over unto the plaintiff, his executors, administrators, and assigns, all the various railway shares specified in a

*278] schedule to the indenture (amongst others, those in *The York, Newcastle, and Berwick Railway Company), and also all other

(*a*) Stat. 17 & 18 Vict. c. ccxi., local and personal, public.

the personal estate of Archer, to have and hold the same upon similar trusts. And the plaintiff accepted the trust; and the shares then became vested in the plaintiff as trustee. Averment: "that the said conveyance and transfer of the said railway shares and premises to him the plaintiff, as aforesaid, was not a sale thereof, or of any part thereof, to the plaintiff, but was a free and voluntary gift and settlement of the same by the said Edward Archer to and for the separate use and benefit of the said Harriet O'Flaherty, his said sister, without any pecuniary or valuable consideration, or other consideration of any kind except the natural love and affection of him the said Edward Archer for his said sister." Averments: that the plaintiff authenticated the transmission of the shares to him by a declaration in writing, and was ready and willing to authenticate it in any manner that the directors might require, and requested the secretary to enter his name in the register of shareholders. General averment of fulfilment of all conditions. Breach: that the defendants would not permit plaintiff's name to be registered. Claim of a writ of mandamus "commanding the defendants to enter and register in the register of shareholders of the said defendants, according to the statute in such case made and provided, and their said duty in that behalf, the name of the plaintiff as the person entitled to, and the holder and proprietor of, the shares in the now undertaking of the defendants, called The North Eastern Railway, under and by virtue of the said transfer and transmission thereof from the said Edward Archer to the plaintiff as aforesaid."

Plea, setting out the indenture, the effect of which was *correctly given in the count: it comprised considerable landed [*279 estate and shares in many other companies, as well as in The North Eastern Railway Company. Averment: that the plaintiff did not at any time before the commencement of the suit deliver the said indenture, or any other transfer of the said shares by the said Edward Archer to the plaintiff, to the secretary of the defendants, to be kept by him, though requested so to do; and that defendants were always willing to register on such transfer being delivered to their secretary, to be kept by him.

Demurrer. Joinder.

The case was now argued.(*a*)

Sir *F. Thesiger*, for the plaintiff.—The question depends upon the construction of The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16). By sect. 14, "every shareholder may sell and transfer all or any of his shares;" "and every such transfer shall be by deed duly stamped, in which the consideration shall be truly stated; and such deed may be according to the form in the Schedule (B.) to this Act annexed, or to the like effect." The form in the Schedule (B.) is "I of in consideration of the sum of paid to

(*a*) Before Lord Campbell, C. J., and Crompton, J.

me by of do hereby transfer to the said share [*or* shares], numbered in the undertaking called "The Company," [*or* pounds consolidated stock in the undertaking called "The Company," standing (*or* part of the stock standing) in my name in the books of the Company], to hold unto the said his executors, administrators, and assigns [*or* successors and *assigns], subject to the several conditions on which I held the same at the time of the execution hereof; and I the said do hereby agree to take the said share [*or* shares] [*or* stock], subject to the same conditions. As witness our hands and seals, the day of ." By sect. 15, "The said deed of transfer (when duly executed) shall be delivered to the secretary, and be kept by him; and the secretary shall enter a memorial thereof in a book to be called the "register of transfers," and shall endorse such entry on the deed of transfer, and shall, on demand, deliver a new certificate to the purchaser."

*280]

These provisions are applicable to sales of shares, where the consideration can be truly stated by inserting a sum of money in the blank in the form in Schedule (B.), and where the simple transfer to a purchaser may conveniently be left with the secretary. But it would not be convenient, or indeed possible, to leave the present deed of settlement, conveying shares in several companies, with each of the secretaries of the different companies: nor could the consideration be truly stated in the form in Schedule (B.). The deed is not a sale; Denn dem. Manifold *v.* Diamond, 4 B. & C. 243 (E. C. L. R. vol. 10); nor can the plaintiff properly be called a purchaser. The case is within sect. 18, which enacts that, "If the interest in any share have become transmitted in consequence of the death or bankruptcy or insolvency of any shareholder, or in consequence of the marriage of a female shareholder, or by any other lawful means than by a transfer according to the provisions of this or the special Act, such transmission shall be authenticated by a declaration in writing as hereinafter mentioned, or in such other manner as the directors shall require; and every such *declaration shall state the manner in which and the party to whom such share shall have been so transmitted;" "and such declaration shall be left with the secretary, and thereupon he shall enter the name of the person entitled under such transmission in the register of shareholders." No inconvenience arises from the trusts, as by sect. 20 the Company is not bound to notice them.

*281]

Hugh Hill, contrà.—When shares in a company are made the subject of a settlement in trust, the ordinary and convenient course is for the settlor to execute a deed in the simple form given in Schedule (B.), transferring the shares for a nominal pecuniary consideration to the trustees, and to take at the same time a separate declaration of trust

The transfer deed is then left with the secretary, and the trustee is registered as absolute owner. This course has not been pursued in the present case: it will be very inconvenient to the defendants if they are obliged to place on their register complicated settlements, even though they are not made thereby trustees; and they submit that The Companies Clauses Consolidation Act, 1845, does not compel them to do so. The system is contained in the clauses, from sect. 14 to sect. 20 inclusive, which are headed "And with respect to the transfer or transmission of shares, be it enacted as follows." It contemplates a difference between transfer and transmission: transfer being where the interest in the shares passes by the conveyance of the holder, whether that conveyance be by way of sale, or mortgage, or a voluntary gift; and transmission being where the interest passes by operation of law upon the holder's *death, or bankruptcy, or marriage, "or by any other lawful means than by a transfer." It is true that in sect. 14 it is said [*282 that "every shareholder may *sell and* transfer" his shares: but that does not mean that there can be no transfer except where it is by way of sale. In stat. 8 & 9 Vict. c. 89, s. 34, the language is, that, where a British ship "shall, after registry thereof, be *sold* to any other or others of Her Majesty's subjects, the same shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of the registry of such ship or vessel, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever either in law or in equity:" and, though the word sold is there used, this enactment has always been held to apply to every species of transfer of ships by the act of the party, though not to transmissions by operation of law. The provision that the consideration shall be truly stated is only for revenue purposes. Where the consideration is not pecuniary, a nominal consideration is the true one for such purposes, as is proved by Denn dem. Manifold *v.* Diamond. The object of requiring (sect. 15) that the transfer should be kept by the secretary was, that the Company should have proof that the transfer really was made by the one party and accepted by the other. It may be essential for their interest to be able to show this: for instance, in an action for calls, an original transfer deed in the form in Schedule (B.) executed by the transferree would be important as evidence against him. For this object it is unimportant whether the transfer was by way of sale or not.

*Sir *F. Thesiger* was heard in reply. *Cur. adv. vult.* [*283

Lord CAMPBELL, C. J., on a subsequent day in this Term (May 3d), delivered judgment.

In this case Colonel Archer had conveyed certain estates and railway shares to the plaintiff, in consideration of 10*s.* and the natural affection which he had for his sister Mrs. O'Flaherty, upon trust to pay the rents and dividends to Colonel Archer for life, and after his death upon trusts in favour of Mrs. O'Flaherty. The secretary of the Company having

refused to register the name of the plaintiff in the register of shareholders, the present action was brought for damages, and with a claim for a mandamus. The question for our decision was, Whether the plaintiff was entitled to have his name entered on the register as a shareholder as a person "entitled under such transmission" referred to in the 18th section of The Companies Clauses Consolidation Act, the Company insisting that the present case fell within the 14th and 15th sections of the Act of Parliament, and requiring that a deed of transfer should be left with their secretary, to be kept under the provisions of the 15th section. We are of opinion that the Company are right in the view they have taken of this transaction.

On examining the clauses in question, we think that all cases in which the property passes out of the proprietor to a new taker are intended to be comprised in the set of clauses which are introduced by the words "With respect to the transfer or transmission of shares": that the 14th and 15th sections relate to all cases of direct transfer and conveyance inter vivos; and that the *transmission clauses relate to property passing otherwise than by conveyance of the party. It was said that transmission by will might be taken as a transmission by the act of the owner of the shares, and that the entry of the new proprietor upon such transmission is regulated by sect. 19; but it is clear that "the transmission by testamentary instrument or intestacy," mentioned in the 19th section, is the transmission, in consequence of death, referred to in the 18th section. It is treated as a transmission in consequence of the death, and not of the conveyance of the party. We find it impossible to hold that the present case falls within the class of cases mentioned in the 18th section: and we do not think that the general words, "other lawful means than by a transfer according to the provisions of" the Act, ought to be construed as bringing a case of transfer by conveyance within the transmissions mentioned in the 18th section. The case appears to us to be within the 14th and 15th sections; and those sections apply to all transfers. The effect of the provisions is that the transfer shall be by an instrument in the form of a sale, which may well be for a nominal consideration. The Legislature says you may transfer by using an instrument in the form of a bill of sale; but we think we should be giving an undue weight to the words *sell* and *transfer* in the 14th section if we were to hold that the word sale restricted such transfers to cases of actual purchase for money. If the case is not one of transmission within the 18th and 19th sections, this is a strong reason for holding that it falls within the 14th and 15th sections: and we are satisfied that the Legislature intended that every transfer should be by deed to be left with the Company, which the new *taker was to execute, to testify conclusively his acceptance of the shares and his taking upon himself the liabilities of a shareholder.

*284]

*285]

Our judgment will therefore be for the defendants.

Judgment for the defendants.(*a*)

(*a*) See Regina *v.* General Cemetery Company, post, May 8th.

The QUEEN *v.* EASTWOOD. *April* 28.

A client of an attorney having applied to have the attorney's bill taxed, the Master taxed off a certain amount, but deducted from this amount certain additions which he allowed to the bill. After this deduction, the sum taxed off was reduced to less than a sixth of the bill delivered. But, if the sum at first taxed off had been compared with the amount in the bill delivered (even augmented by the additions allowed), the deduction would have been more than one-sixth.

Held: that the sum taxed off ought not to have been reduced by the addition allowed; and that the costs of the taxation were to be paid by the attorney, under stat. 6 & 7 Vict. c. 73, s. 37.

THE defendant was tried at the Summer Lancashire Assizes, 1855, on a coroner's inquest charging him with manslaughter, and was acquitted. The defence was conducted by Reuben Hartley, an attorney of this Court, who afterwards delivered a bill amounting to 36*l.* 14*s.* 6*d.* On the defendant's application, the bill was taxed. On the taxation, the Master taxed off 7*l.* 0*s.* 3*d.* from the bill delivered: but he also added 1*l.* 4*s.* 8*d.*, in respect of items not included in the bill delivered; namely, 14*s.* 8*d.* for the assize fee, 6*s.* 8*d.* for preparing brief, and 3*s.* 4*d.* for attending counsel. He then made his allocatur as follows.

	£	*s.*	*d.*
"Bill delivered - -	36	14	6
Taxed off - - -	5	5	7
Allowed for costs - -	31	8	11"

*It appeared that the 5*l.* 5*s.* 7*d.* was put down by mistake for 5*l.* 15*s.* 7*d.*, which was made up by deducting the 1*l.* 4*s.* 8*d.* from the 7*l.* 0*s.* 3*d.* According to this mode of stating the account, the amount struck off did not amount to one-sixth of the amount in the bill delivered. The Master afterwards taxed the costs of taxation, and made the following addition to the account. [*286

	£	*s.*	*d.*
"Amount of bill as taxed -	31	8	11
Credit for - - -	8	0	0
	23	8	11
Costs of taxation - -	4	9	0
	27	17	11"

The credit was given in respect of a sum which the defendant had paid before taxation. The defendant, being threatened with an action, paid this amount.

Lush, in last Term, obtained a rule, calling on Reuben Hartley to show cause why the Master should not be at liberty to review his taxation, by disallowing to the said Reuben Hartley the costs of taxation, and allow the same to the applicant; and why he should not amend his allocatur accordingly. And why the said Reuben Hartley should not refund what has been paid him for the costs of taxation, and what may be found due upon amended allocatur.

Phipson now showed cause.—It is true that, if, instead of deducting the 1*l.* 4*s.* 8*d.* from the 7*l.* 0*s.* 3*d.*, and treating the remainder as the sum struck off, the 7*l.* 0*s.* 3*d.* be considered as the sum struck off, either from the 36*l.* 14*s.* 6*d.*, or from 37*l.* 19*s.* 2*d.* (the aggregate of the 36*l.* 14*s.* 6*d.* and the 1*l.* 4*s.* 8*d.*), it will be *more than one-sixth of the bill. But that is not the proper mode of ascertaining the "event" of the taxation, within the meaning of stat. 6 & 7 Vict. c. 73, s. 37. The ascertaining of the deduction 7*l.* 0*s.* 3*d.* was a step only in the taxation; the ultimate taxation was that which resulted from the addition and deduction when both taken into account. The defendant therefore must pay the costs of taxation, as the "bill when taxed" is not "less by a sixth part than the bill delivered."

*287]

Lush was not called upon to support the rule.

Per Curiam (Lord CAMPBELL, C. J., WIGHTMAN, ERLE, and CROMPTON, Js.).—We are all of opinion that the proper course was to estimate the deductions by themselves, as constituting the sum taxed off, and not to reduce them by the addition made to the bill.

Rule absolute.

Ex parte METCALFE. *April* 28.

The Court will not order a Local Board of Health to pay a reasonable remuneration to the person conducting the first election of the Board, upon the suggestion that they have allowed only an inadequate sum: the Board having under The Public Health Act, 1848 (11 & 12 Vict. c. 63), a discretion as to what sum they think reasonable to allow, and the exercise of their discretion in this respect not being subject to review.

J. GRAY moved for a mandamus commanding The Local Board of Health of Keighley, in Yorkshire, to show cause why they should not pay to Richard Metcalfe a reasonable remuneration for the performance of his duties under The Public Health Act, 1848 (11 & 12 Vict. c. 63). It appeared that Metcalfe had been duly appointed, under sect. 21, to preside at the first election of The Local Board of the district, and had conducted the election and performed the duties of the office. He and his partner (who were attorneys) had, for some time *preceding the election, been almost exclusively engaged in preparing for

*288]

it, and had incurred expense in the payment of numerous assistants. After the election, he sent in an account charging for the services of himself, his partner, and the assistants. The Local Board disallowed the charges for the assistants, and made other large deductions in respect both of the business done and the expenses incurred: and Metcalfe deposed that the sum which they proposed to pay was not a reasonable remuneration. *J. Gray* now urged that by sect. 30 the "necessary expenses" and a "reasonable remuneration" and "expenses incurred" should be allowed. [Lord CAMPBELL, C. J.—How can we control or review the discretion of the Board? Suppose they were to answer that they had allowed what they thought reasonable.] That would not be a sufficient answer, unless they added that it was reasonable in fact. Suppose they appeared to have allowed a mere colourable sum, as a penny.

Lord CAMPBELL, C. J.—The obligation can be only to pay such sum as they consider reasonable. The statute vests in them a discretion which it is supposed they will exercise honestly; and we cannot review their judgment as to what is reasonable.

WIGHTMAN and ERLE, Js., concurred.

CROMPTON, J.—The case which Mr. *Gray* puts would not be one of an exercise of discretion: but, where we cannot see that there has not been an exercise of discretion, we cannot interfere.

Rule refused.

*CHARLES SAMUEL TOZER *v.* ROBERT CHILD and THOMAS HOWARD. *April* 29.

[*289

Count for maliciously rejecting the plaintiff's vote at an election of vestrymen and auditors under stat. 18 & 19 Vict. c. 120. Plea: That the plaintiff was rated to a church rate more than six months before the election, and at the time of the election the rate was due and unpaid. Replication: That the rate was void in this, that it was made for defraying expenses for which a rate could not be made. Rejoinder: That the rate was good on the face of it, and had never been quashed. Demurrer. Held, that, the plaintiff having no means of questioning the rate, the rejoinder was not good. But that the replication was good, as it showed that the rate was not due, and therefore that the plaintiff was entitled to vote; and that the action lay, malice being admitted on these pleadings.

COUNT. That the first election of vestrymen and auditors of accounts for the parish of Saint Clement Danes under stat. 18 & 19 Vict. c. 120, was duly holden: and the plaintiff, being a parishioner and duly qualified to vote, offered his vote to the defendants, who were churchwardens presiding at the election; but the defendants, "well knowing the premises, but contriving and fraudulently and maliciously intending to injure the plaintiff and disappoint him of his privilege of and in the premises," would not receive his vote.

Plea: That, more than six months before the election, the plaintiff being then an inhabitant and occupier of premises in the parish, "a

certain rate or assessment, entitled and being" "a fair and equal rate or assessment at three pence in the pound according to the pound rents, made the 11th day of May, 1854, by the rector, churchwardens, overseers, and other inhabitants of the parish of Saint Clement Danes, in the county of Middlesex, duly convened and met together for that purpose in the vestry room of the said parish by due and legal notice, being a rate or assessment upon all and every the inhabitants and occupiers of houses, shops, chambers, rooms, warehouses, lands, tenements, and all other rateable property within the said parish, for defraying the *290] *expenses of repairing, amending, and supporting the church and churchyard, and vestry room of the said parish, and the other necessary expenses and outgoings relative to the office of churchwarden of the parish for the present year of office," was duly and lawfully made by the rector, &c. Averments: that plaintiff was assessed in that rate and charged 10*s.* 6*d.*; that it was a parochial rate within the meaning of stat. 18 & 19 Vict. c. 120, s. 16; that plaintiff, more than six months before the election, had notice of the rate; and, at the time of the election, the rate was still unpaid, and the plaintiff not entitled to vote; "wherefore the defendants refused to allow the plaintiff to give his vote or to vote at the said election."

Replication: That the supposed rate or assessment in that plea mentioned was not duly or lawfully made as alleged, but on the contrary thereof was and is wholly illegal and void in this, to wit, that it was a rate or assessment for, amongst other things, the defraying of expenses and outgoings for which such a rate or assessment could not legally or lawfully be made; and the said expenses and outgoings were so included in the said rate or assessment as to make the said rate or assessment wholly illegal and void.

Rejoinder: That "the said rate or assessment was and is valid and legal on the face thereof, and had not at any time before the plaintiff offered to give his votes and to vote as in the said first count is mentioned, nor has it since, been quashed or pronounced or adjudged to be illegal or void by any Ecclesiastical Court, or by any other Court having jurisdiction in that behalf; nor had the validity or legality of the said rate or assessment then, nor has it since, been questioned in any *291] Ecclesiastical Court; but the said rate or assessment was, *during the time of the said election, and when the plaintiff offered to give his vote and to vote as aforesaid, and when the defendant did what is complained of in the said first count, and still is, a subsisting rate or assessment."

Demurrer. Joinder.

The case was now argued.(*a*)

Shee, Serjt., for the plaintiff.—The Metropolis Local Management Act (18 & 19 Vict. c. 120), by sect. 16, prescribes the mode of electing

(*a*) Before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.

vestrymen and auditors. The election is to be by the parishioners then rated to the relief of the poor in the parish: "provided nevertheless, that no person shall be entitled to join or vote in any such election for any parish, or any ward of any parish, or be deemed a rate-payer thereof, or be entitled to do any act as such under this Act, unless he have been rated in such parish to the relief of the poor for one year next before the election, and have paid all parochial rates, taxes, and assessments due from him at the time of so voting or acting, except such as have been made or become due within six months immediately preceding such voting or acting." That proviso disqualifies the plaintiff from voting if the assessment in question was due from him; but, if the rate was void, it was not due. Now the replication shows that the rate was void. [Lord CAMPBELL, C. J.—The replication avers that the rate was, amongst other things, for defraying expenses for which such an assessment could not legally be made. It would be proved if any item was included in the estimate *which was not strictly [*292 legal, though perhaps it might be a very small sum for something approved of by almost all the parishioners. Such an item should not be allowed: but would it render the rate void?] If the rate is excessive it is illegal; and, though good on the face of it, cannot be enforced; Farlar *v.* Chesterton, 2 Moore P. C. 330.(*a*) The rejoinder shows that the rate has not been quashed; but a person assessed to a church rate cannot take any step to cause the rate to be quashed. All he can do is to dispute its validity, and refuse to pay it; Regina *v.* Colling, 17 Q. B. 816 (E. C. L. R. vol. 79), Rogers' Ecclesiastical Law (p. 223, 2d ed.). If the churchwardens will not take the initiative and institute proceedings against the parishioners, the rate must remain good on the face of it. It is true that the rate appears on this record to have been made in part for proper purposes: but, if the construction of the Act be as the defendants contend, the plaintiff must lose his franchise, unless he pays the whole, which avowedly includes more than he is bound in law to pay.

Knowles, contrà.—The rejoinder is good. The presiding officer at the election has no means of trying the validity of the rate; he must act upon the supposition that a rate good on the face of it is valid; and even if the rate be avoided on appeal he is protected; Durrant *v.* Boys, 6 T. R. 580, Hutchins *v.* Chambers, 1 Burr. 579, 580. It is true that there is no appeal against a church rate: but the objections here raised are rather as to the intended application of the money than to the rate itself. In Griffin *v.* Ellis, 11 A. & E. 743, 756 (E. C. L. R. vol. 39), Lord Denman, C. J., in delivering judgment, expresses *doubt [*293 "whether the rate, being in its form regular and lawful, was vitiated by *any* design to employ in any manner; for, if the employment of it should be unlawful, appeal might be made against the church-

(*a*) See Chesterton *v.* Farlar, 7 A. & E. 713 (E. C. L. R. vol. 34).

wardens' accounts." And in Rex *v.* Sillifant, 4 A. & E. 354, 361 (E. C. L. R. vol. 31), Lord Denman, C. J., says: "I believe we are all satisfied that there is nothing in the objection that the purposes of this rate are retrospective, the rate being correct on the face of it. That point could be raised only in objecting to the accounts." But, even supposing that the vote was good, the churchwardens cannot be personally liable for rejecting it, as it appeared to be bad. [Lord CAMPBELL, C. J.—Not if the refusal was bonâ fide; it is, however, a question whether, on this demurrer, we must not take it to have been a malicious refusal.]

Shee, Serjt., in reply.—In Durrant *v.* Boys, and Hutchins *v.* Chambers, 1 Burr. 579, the rates were poor-rates, against which an appeal lies by the party aggrieved. In such a case it is just that a rate unappealed against should be held good. But it would be very unjust to apply this to a church rate against which the party aggrieved cannot appeal. Farlar *v.* Chesterton, 2 Moore P. C. 330, is an express authority that the Ecclesiastical Courts will not enforce a rate made under the circumstances pleaded in the replication. *Cur. adv. vult.*

Lord CAMPBELL, C. J., on a subsequent day in this term (May 1st), delivered judgment.

*294] We were at first much struck by the inconvenience *which may arise if, at the election of vestrymen under the Act for the better management of the Metropolis, the churchwardens, who preside as returning officers, may be called upon to determine the legality or illegality of a church rate which is good upon the face of it: but, upon consideration, we think that greater inconvenience would arise if the non-payment of such a rate, although it has not been previously questioned, must conclusively disfranchise the parishioners. It seems quite certain from the authorities cited in the argument that there is no appeal against a church rate, and that the parties assessed have no means of contesting its validity till the churchwardens think fit to sue them for non-payment of it. It seems equally certain that, when so sued in the Ecclesiastical Court, the parties rated are permitted, by way of defence, to allege and prove that, although the rate be made with all due formality, and although it professes to be made only for necessary and lawful purposes, it was in truth made for some unlawful purposes, and that it is excessive. The misapplication of the fund might be objected to when the churchwardens are called upon to render their accounts: but the course of the Ecclesiastical Courts is to relieve the parishioners from the payment of such a rate, and to pronounce it to be illegal. The dictum of Lord Denman in Rex *v.* Sillifant, 4 A. & E. 361 (E. C. L. R. vol. 31), that the objection to the purposes for which a church rate, good on the face of it, is made can only be raised by excepting to the churchwardens' accounts, is at variance with Farlar *v.* Chesterton and other solemn decisions. This being so, we think that under stat. 18 &

19 Vict. c. 120, s. 16, the parishioner, at the *time of the election of vestrymen, when his vote is challenged for non-payment of a church rate, must be permitted to show that the *assessment is not due from him at the time of voting*, the rate being illegal and void. The greatest hardship and injustice might otherwise follow; for the churchwardens, six months before the day of election, might procure a rate to be made, good on the face of it, but for illegal purposes; and, never attempting to put it in force, might disqualify all the parishioners who omitted to pay it. Mr. *Knowles* argued that the churchwardens might bonâ fide believe the rate to be good, although it may be afterwards held to be bad in point of law, and that thus they would or would not be liable to an action for refusing the vote according as one Court holds the rate to be good or another bad. This consequence by no means follows; for, if the churchwardens act honestly in rejecting the vote, they are liable to no action, be the rate good or bad. This declaration, following the precedent in Ashby *v.* White, 2 Lord Raym. 938, alleges that the defendants, knowing that the plaintiff was a parishioner entitled to vote, fraudulently and maliciously prevented him from exercising his franchise. If they acted bonâ fide, although mistakenly, under their plea of Not Guilty they have a good defence. It was suggested that this plea is an argumentative plea of Not Guilty, showing that there was no malice. But, admitting the scienter, and not denying the malice, the plea is pleaded only to the title of the plaintiff; and, consistently with all its allegations, the defendants themselves may have procured the rate to be made. They may have been aware that it could not lawfully be enforced; for that reason they may have *abstained from attempting to enforce it, and, in refusing the plaintiff's vote, they may have acted fraudulently and maliciously. [*295 [*296

For these reasons we think that the replication showing the illegality of the rate is sufficient; that the rejoinder, merely alleging that the rate is good on the face of it, and has not been questioned, is bad; and that there must be judgment for the plaintiff.

Judgment for the plaintiff.

THOMAS BITTLESTONE, JOHN JONES, and THOMAS BAYLIS, Assignees of JAMES BOUGH, a Bankrupt, *v.* WILLIAM COOKE, SAMUEL HINDLEY, and DAVID LOW, Defendants. *April* 29.

B., a trader, by bill of sale, conveyed all his stock, and all the stock that should during the continuance of the security become his, with a power of sale, to C., as a security for money to be advanced by C. The bill of sale was drawn up as a security for an existing debt, as well as for fresh advances; but this was a mistake, the whole consideration being fresh advances not to exceed a certain sum. C. made the advances; the property in fact was of about three times the value of the advances. B. was at this time in reality insolvent: but the Court, which had power to draw inferences of fact, drew the inference that the advances were bonâ fide asked for and made with a view to keep the business going, and in the belief that they would enable B. to get over his difficulties. Afterwards C. took possession of the goods. B. being declared a bankrupt, his assignees brought trover against C., contending that the transaction in question was itself an act of bankruptcy. On a case stating these facts, in which the Court had power to draw inferences of fact:

Held, that the transaction must be viewed as if the bill of sale had been drawn as it was intended to be, entirely as a security for fresh advances.

That the effect of pledging the whole of the trader's property for such advances was not necessarily to delay his creditors, as the advances, even if bearing a small proportion to the value of the property pledged, might be of more advantage to the trader and his creditors than the property itself; and, consequently, that the bill of sale in this case, being in fact bonâ fide, was not, in point of law, fraudulent, nor an act of bankruptcy.

TROVER for carpets, rugs, and other worsted fabrics, the property of the plaintiffs, as assignees of Bough, a bankrupt.

Pleas. 1. Not Guilty. 2. That the goods were not the plaintiffs'. Issues thereon.

*297] *On the trial, before Lord Campbell, C. J., at the Guildhall Sittings after Michaelmas term, 1854, a verdict passed for the plaintiffs, subject to a case; by which it appeared that James Bough, the bankrupt, was a manufacturer at Kidderminster, and the defendants yarn warehousemen in London. Bough was bound by articles of agreement to consign all his goods to the defendants under a penalty of 500*l.* He had broken this agreement, and had, on 9th May, 1853, on this account given the defendants a promissory note for 500*l.*, which was never paid. Nothing ultimately turned on the existence of this note, which, it appeared, was merely taken by the defendants in terrorem, without any intention at any time to enforce it; but it is necessary, in order to explain part of the case, to state the existence of a note of this precise amount, and that it was agreed that it was sufficiently shown to be merely accidental. Bough continued, after this, to make consignments of his manufactures to the defendants, who made him advances by accepting drafts to an amount never exceeding the value of the consignments. On the 27th January, 1854, the value of the consignments in the defendants' hands was about 4600*l.*, and the acceptances then running were about 4000*l.*

The case stated a correspondence and facts, from which it appeared that, in the latter part of 1853, Bough was embarrassed; that the defendants were perfectly aware of this, and were willing to assist him

but did not know the whole extent of his difficulties; and that Bough, who was struggling to keep his business going, deceived them as to the extent of his embarrassments. The case then proceeded as follows.

On the evening of the 25th of January, 1854, the bankrupt came to London, and on the same evening had an interview with the defendants; at which meeting he *produced a rough statement of his affairs, written out by himself in a small account book, and which the bankrupt stated he had copied from his stock book, and that it showed the exact state of his affairs, and his last stock taking at Christmas, 1853. At this meeting, the state of the bankrupt's affairs was gone into; and he represented to the defendants (as was also shown by the written statement of his affairs before referred to) that he was not only solvent, but that he could retire from business with a clear surplus of at least 1100*l.*, after paying all his debts, and after making an allowance of 1000*l.* for the difference between the value of his stock and what it would sell for. A calculation was made by the bankrupt, at this meeting, as to what bills of his were coming due for the next three weeks; and they were found to amount to 1514*l.* A calculation was also made by the defendants of what goods the bankrupt was likely to send the defendants during the same period; and it was considered between them that he would require something between 500*l.* and 800*l.* to meet his payments, including the bills. The bankrupt therefore proposed that the defendants should advance him between 500*l.* and 800*l.* to meet his payments, including the bills so coming due. In the first instance the bankrupt proposed to deposit yarns with the defendants as security for such an advance: but the defendants declined that security: and it was eventually, on the same day, agreed between the bankrupt and the defendants that the defendants should advance the bankrupt a sum of between 500*l.* and 800*l.*, and that the bankrupt should give them a bill of sale, which was afterwards prepared as hereinafter mentioned, as a security for the same. The defendants having agreed to make this advance, the bankrupt then stated that he should require some new looms, and that the *cost of them would be about 2000*l.*; but that he could raise 1000*l.* of that sum, and wished the defendants to advance the other 1000*l.*, stating that it would not be required immediately, as the looms would have to be made; and it was then agreed that the bill of sale should be a security both for the sum to be advanced to enable the bankrupt to meet his payments, including the bills, and also for the additional sum of 1000*l.*, in case the defendants should advance the same. On the 25th of January, 1854, previously to the bankrupt's arrival in London, Mr. Hindley, one of the defendants, instructed his solicitor to draw a bill of sale for securing advances about to be made to the bankrupt. The solicitor accordingly prepared and engrossed a bill of sale, which is hereinafter set forth, leaving blanks for the figures, which were filled up just before the bill of sale was executed. On the

[*298

[*299

27th of January the bankrupt and the defendant Mr. Hindley went to the solicitor's office, when the bankrupt executed the bill of sale. When the deed was executed, the precise sum which the bankrupt would require to be immediately advanced to him was not known; but it was known that it would exceed 500*l.*; and that amount was inserted in the bill of sale as if that sum had been already advanced. This was done on account of the form in which the bill of sale had been drawn and engrossed by the solicitor. The promissory note for 500*l.* did not enter into the contemplation of any or either of the parties to the bill of sale, either when instructions were given for it, or when it was executed; and it forms no part of the money intended to be secured by the bill of sale. With the exception of the promissory note for 500*l.*, the bankrupt, at the time of the execution of the deed, was not indebted
*300] to the defendants in any sum *whatever. On the contrary, the accounts between the bankrupt and the defendants, as they stood at the time of the execution of the bill of sale, exhibited a balance due from the defendants to the bankrupt. At the time when the bill of sale was executed, 160*l.* was taken as the balance due to the bankrupt. On the 27th of January, 1854, the bankrupt, in pursuance of the agreement made between him and the defendants on the 24th of January, 1854, and in order to secure the repayment of the moneys so agreed to be thereafter advanced, executed a bill of sale prepared by the solicitor of the defendants. The following is a copy of the material part of the bill of sale. "This indenture, made the 27th day of January, 1854, between James Bough, of, &c., of the one part, and William Cooke, Samuel Hindley, and David Law, of, &c., copartners, of the other part: Whereas the said Bough is indebted to the said Cooke, Hindley, and Law in the sum of 500*l.*, which he the said Bough doth hereby admit and acknowledge, and the said Bough may hereafter become further indebted to the said Cooke, Hindley, and Law; and whereas it hath been agreed that, for the better securing the payment as well of the said sum of money so now due and owing as aforesaid, as of all and every such further sum and sums of money which shall or may hereafter become due from the said Bough to the said Cooke, Hindley, and Law as aforesaid, together with interest for the same respectively as hereinafter mentioned, such advances not to exceed in the whole the sum of 1800*l.*, he the said Bough shall make the assignment hereinafter contained: Now this indenture witnesseth that, in pursuance of the said agreement, and in consideration of the said sum of money so now due
*301] from the said Bough to the said Cooke, Hindley, and *Law, and of such further sum and sums as may hereafter become due as aforesaid, he the said Bough hath bargained, sold, &c., and transferred to Cooke, Hindley, and Law all that and these the stock in trade, looms, plant, fixtures, business utensils, fittings, and things which are now in, about, or upon any part of the premises now occupied by the

said Bough, and all the right, title, interest, claim, and demand of him the said Bough of and in the said goods, chattels, and effects, and every part thereof respectively, and also all such other stock in trade, looms, plants, fixtures, business utensils, fittings, and things which shall or may at any time hereafter during the continuance of this security belong to, or be in, upon, or about the premises now occupied by the said Bough, or in, upon, or about any other premises which for the time being may be occupied or used, or belong to the said Bough, and all the right, title, property, claim, and demand whatsoever of him the said Bough, of, in, and to the same and every part thereof respectively, to have, &c. Provided nevertheless, and it is hereby declared and agreed by and between the said parties to these presents, that, if the said Bough shall, by two equal instalments of 250*l.*, the first of such payments to be made on the 10th day of February, and the second on the 10th day of March next, pay unto the said Cooke, Hindley, and Law the said sum of 500*l.*, together with interest for the same after the rate of 5*l.* per cent. per annum from the day of the date of these presents, and also shall and will pay all and every such other sum and sums of money which shall or may at any time or times hereafter become due and owing from the said Bough to the said Cooke, Hindley, and Law on any account or transaction whatsoever, with interest after the rate aforesaid upon all and every such sum and *sums of money from the time or respective times when the same shall respectively become due and payable, without deduction or abatement whatsoever, then and in every such case these presents, and every article, clause, and thing herein contained, shall cease, determine, and be absolutely void." The deed contained covenants to pay these moneys, and, in case of default, a power of sale. On the day on which the bill of sale was executed and immediately after the execution of it, the bankrupt received from the defendants at their counting-house in Friday Street, as part of the money agreed, on the 25th of January, 1854, to be advanced on the security of the bill of sale, the sum of 373*l.* 5*s.*, viz. 170*l.* 5*s.* and 200*l.* in two checks which were duly honoured, and 3*l.* in cash. The 170*l.* 5*s.*, the produce of the check for that amount, was, on the same day, paid away by the bankrupt to retire an acceptance for that amount due that day in favour of Mr. McMichael, one of the trade creditors. The 200*l.*, the produce of the check for that amount, was, on the following day, paid by the bankrupt to his bankers, Messrs. Farley, Turner, and Jones. The 3*l.* in cash was an amount advanced to the bankrupt by the defendants, he stating that he was short of ready cash to pay his travelling expenses. On the same 27th of January, 1854, the defendants, as further part of the money agreed on the 25th of January to be advanced on the security of the bill of sale, accepted for the bankrupt a bill at three months' date for 300*l.*, drawn by the bankrupt on them, which bill was duly paid by the defendants. This

[*302

bill was also paid by the bankrupt to the plaintiff Jones and his partners on the 28th of January, 1854, along with the 200*l.*, produce of the check before referred to. The first instalment of 250*l.* mentioned in the deed never was demanded or *paid; nor has any part of the moneys intended to be secured by the deed been paid, except as hereinafter appears. The transactions between the defendants and the bankrupt subsequently to the 27th of January were as follows, viz. The bankrupt on his part consigned to defendants goods, at the dates and of the values, not deducting the defendants' commission and expenses, as under, viz.: 30th January, 1854, 250*l.* worth; on the 1st of February, 1854, 56*l.* worth; on the 3d, 80*l.* worth; 6th, 120*l.* worth; 13th, 300*l.* worth. All the goods so sent by the bankrupt to the defendants were sent by the bankrupt, not of his own head, but in pursuance of letters and orders given by the defendants to the bankrupt. These goods were sent in the usual course of business; the usual course of business being for the defendants to specify the goods they wanted, and for the bankrupt to send such goods. The defendants admit a conversion of all the above goods before action. The defendants on their part, on the 31st of January, 1854, by way of further advance to the bankrupt, accepted for him a bill for 500*l.* at four months, drawn by the bankrupt on them, which the bankrupt on the 1st of February got discounted, and which bill was duly paid by the defendants. On the 9th of February the defendants made a further advance to the bankrupt of 100*l.* in cash. On the 11th of February, 1854, the defendants, by way of further advance, accepted for the bankrupt a bill for 350*l.* at four months, drawn by the bankrupt upon them, which bill was duly paid by the defendants. On the 8th of February, 1854, a bill for 100*l.* at four months' date, drawn by Messrs. Belcher, Phillips, and Brown, of Leeds, trade creditors, upon and accepted by the bankrupt for a trade debt, fell due and *was dishonoured. To assist the bankrupt in taking up the bill they, in compliance with his previous request, lent him 50*l.*; but he did not take up the bill. Early on the 11th of February, 1854, the bankrupt drew a check for 50*l.* upon his bankers for payment of wages, which check was refused payment by the bankers, but was afterwards, on the same day, paid by them at the bankrupt's request. On the 11th of February, 1854, the bankrupt was in insolvent circumstances; and he knew that fact, and believed that his affairs must be wound up under the bankrupt law, or by composition with his creditors.

*303]

*304]

The case then showed that the defendants, becoming aware of Bough's insolvent state, seized his goods under the bill of sale, and that Bough was adjudged a bankrupt on the petition of a creditor whose debt was due before the execution of the bill of sale.

The Court were to have power to draw inferences of fact.

The question for the Court was, whether the plaintiffs were entitled to recover in respect of any, and which, of the said goods.

Hugh Hill, for the plaintiffs.—It does not appear that the defendants had notice of any act of bankruptcy when they seized the goods: but that is immaterial if the bill of sale under which they took the goods was itself an act of bankruptcy. A transfer of the whole or nearly the whole of a trader's goods, under such circumstances as necessarily to defeat or delay his creditors, is an act of bankruptcy; Graham *v.* Chapman, 12 Com. B. 85 (E. C. L. R. vol. 74), Smith *v.* Cannan, 2 E. & B. 35 (E. C. L. R. vol. 75). The deed of 27th of January *conveyed all the trader's property, then worth about [*305
6000*l.*, and also his future stock in trade. On the face of it it conveyed it in consideration of an old debt of 500*l.*, and a fresh advance not in the whole to exceed 1800*l.* The defendants have satisfactorily shown that in fact there was no intention to secure the old promissory note for 500*l.*, and that the bill of sale really was only in consideration of the future advance; but the parties cannot contradict the deed. [Lord CAMPBELL, C. J.—The parties could not in any action at law between themselves set up the real intention to contradict the deed; but that is not the present case.] Even if the deed were to be taken to be drawn as it was intended to be, the effect of it was that the trader put the whole of his property out of the reach of his creditors, for advances which ultimately turned out to be not more than one third of the value, and which might have been less. The effect is necessarily to delay creditors who should take out execution; Graham *v.* Chapman, Smith *v.* Cannan. The principle of those cases was acted upon in Leake *v.* Young, 5 E. & B. 955 (E. C. L. R. vol. 85). Lee *v.* Hart, 10 Exch. 555,†(*a*) may be relied on, but is distinguishable. It was the case of a sale out and out, at a low price it is true, but still a sale. Here the goods are put out of the reach of the trader's creditors, by pledging them for what is not a third of the price.

Sir *F. Kelly*, for the defendants.—The form of the deed is not conclusive; it was drawn up so as not to express the real intention; and a Court of equity would *have reformed it. In considering whether [*306
it is an act of bankruptcy, as being a fraudulent conveyance, the real transaction must be looked to. That, it appears, was solely a pledge for future advances; the defendants bonâ fide believed that the advances they thus made would help the trader through his difficulties; and, though the trader ought perhaps to have known that he could not avoid bankruptcy, it is the fair conclusion from the facts that he expected to be able to continue business by the aid of these advances. The question then is, whether the pledge of a trader's stock for advances made with the bonâ fide object of assisting and paying the creditors of the trader must, as a matter of law, be considered an act of bankruptcy,

(*a*) Accord S. C. (upon bill of exceptions on a new trial), 11 Exch. 880.†

as being a fraudulent conveyance, with intent to delay or defeat them. A conveyance of all a trader's goods, if it be for an equivalent, is not an act of bankruptcy; Baxter *v.* Pritchard, 1 A. & E. 456 (E. C. L. R. vol. 28). The cases cited on the other side, Graham *v.* Chapman, 12 Com. B. 85 (E. C. L. R. vol. 74), Smith *v.* Cannan, 2 E. & B. 35 (E. C. L. R. vol. 75), Leake *v.* Young, 5 E. & B. 955 (E. C. L. R. vol. 85), were all conveyances in part at least for a bygone debt, which could not be an equivalent. Lee *v.* Hart, 10 Exch. 555,†(*a*) shows that, where there is a sale for money, which may be an equivalent, the lowness of the price does not make the transaction void, unless there be fraud in fact. A present advance of money may be an equivalent, though the assignment embraces after acquired stock; Hutton *v.* Cruttwell, 1 E. & B. 15 (E. C. L. R. vol. 72): the smallness of the amount of the advance is only material as evidence of fraud in fact, which in the present case the other facts disprove.

H. Hill was heard in reply.

*307] *Lord CAMPBELL, C. J.—I am of opinion that the defendants are entitled to our judgment. The question is whether the bill of sale of 27th January is an act of bankruptcy. I think that a conveyance by a trader of goods with a view to obtain future advances is not necessarily as a matter of law an act of bankruptcy, though the whole of the trader's stock, present and future, is included in the conveyance. If the conveyance be bonâ fide with a view to obtain advances for the purpose of carrying on the trade, I think it is not an act of bankruptcy. It is unnecessary to enter into the reasons which lead me to think that this is the law; for Hutton *v.* Cruttwell is an express decision in this Court that such a conveyance is not necessarily an act of bankruptcy; and there is no authority against it. Graham *v.* Chapman, and Smith *v.* Cannan, 2 E. & B. 35, are authorities that, where such a conveyance is in part for a bygone debt, it is an act of bankruptcy; but do not touch this case, where the conveyance is entirely for fresh advances. Then, if such a conveyance is not as a matter of law an act of bankruptcy, how are the facts as to which we are to draw inferences? Now we are first to view the bill of sale itself as if it had been reformed in equity, so as to make it be read as it was meant to be, as a conveyance by way of security for future advances. Then I draw the conclusion that there was no fraud in fact; that the defendants and the trader both thought that the advances were requisite for carrying on the business, and would enable the trader to do so. Still after this there remains what is the great argument for the plaintiff, that the

*308] advance was disproportioned to *the value of what was pledged. The property pledged was worth 6000*l.*; and the limit of the advance stipulated for only 1800*l.*; and the sum actually obtained was far below the value of the goods. Now I agree that a conveyance of

(*a*) See 11 Exch. 880.†

this sort is invalid unless there be an equivalent; but I cannot say that the advantage obtained for the trader and his creditors by these advances was not a full equivalent for the pledge. In times of pressure an advance in ready money of a very small amount may very often enable a trader to avoid stopping payment, and so enable him to pay all his creditors 20*s.* in the pound. I cannot therefore say that the inadequacy of the advance makes the deed fraudulent as a matter of law: and, drawing inferences of fact, I find it was not, in this case, fraudulent in fact. I do not think there was any intention to delay or defeat creditors: and, looking at the facts as they appeared at the time, I should think the transaction must have appeared to both parties likely rather to have benefited than to have defeated the creditors.

(WIGHTMAN, J., had left the Court before the conclusion of the argument.)

ERLE, J.—I also am of opinion that the judgment must be for the defendant. The deed was an assignment of all the trader's stock, including what he might afterwards acquire; but such an assignment is not in law an act of bankruptcy, unless it be one the effect of which would be to defeat or delay the creditors. In fact, I think this assignment was perfectly bonâ fide, made in the sincere belief that by the aid of the money thus obtained the trader would be able to go on, and that it would *assist the creditors. It is probable that in the result it has delayed them; and, if the trader had known that such must be the effect, it might have been fraudulent; but I think, on the facts stated, there are indications that the trader stood so that he hoped to be able to go on. It is true that the real state of his affairs was such that he could not possibly continue his trade; and perhaps he knew so much of them that it ought to have been clear to his mind that he could not go on. But it is plain to me that this was not clear to his mind, and that he raised this money intending, not to delay his creditors, but to meet them. It is then urged that the conveyance of the trader's goods puts them out of the reach of process; that, being under pledge, they could not be taken under a fi. fa., and so creditors must be delayed. That is in effect saying that an assignment of all a trader's goods as a pledge for a sum less than their value must, in point of law, be an act of bankruptcy. But to hold so seems to me inconsistent with the very salutary decision that a bonâ fide sale of goods in a season of pressure by a trader for whatever ready money can be obtained is valid, though the price may be small. The principle of that decision I take to be, that the power of raising a small sum in ready money on an emergency may often, in the exigencies of trade, be of immense value. We have seen times when bankers of undoubted solvency have had difficulty in raising a few thousand pounds, though the command of that sum for a few hours was essential to enable them to keep the bank open, and so to preserve a business of immense value. It would be dangerous to lay

[*309

down that an arrangement by which a trader under such circumstances raises money is as a matter of law void because of any disproportion between the security and the sum raised. I think that the *pro- *310] portion which the sum raised bears to the value of the property pledged, in this case about one-third, is a circumstance to be considered in determining whether the transaction is bonâ fide or not, but is not conclusive that it is fraudulent; and I think the same of the circumstance that the assignment embraced all the trader's stock, including what he might acquire afterwards. There often may be a very good reason for taking a security over the whole of a trader's stock present and future, as then the stock may be used in the mean time and made a source of profit, whilst, if a portion of the existing stock is separated and set aside as a security, it is tied up from use. I am confirmed in this conclusion by the decision in Hutton *v.* Cruttwell, which is precisely in point. If it were competent to us to overrule that case I should not do so, as I think it a salutary decision, and that such bills of sale should be watched to see if they are bonâ fide, not held necessarily void.

CROMPTON, J.—We must first determine whether we may look at the real transaction, or whether we are concluded by the terms of the bill of sale, and bound to consider this as a conveyance, in part for a bygone debt. Now, the question for decision is, whether this deed was fraudulent as intended to delay or defeat creditors; and, for the purpose of determining whether it was or not, we must look at the real transaction: and we find that it was intended to be a pledge exclusively for future advances.

Then is that, though bonâ fide, necessarily as a matter of law an act of bankruptcy? It could hardly be so *argued consistently *311] with Hutton *v.* Cruttwell, 1 E. & B. 15 (E. C. L. R. vol. 72). Had there not been that decision, I should have thought it well to take time to consider the decided cases. The old cases clearly established the rule that a conveyance of the trader's property, leaving it no longer in his option whether he would continue his trade, was in law an act of bankruptcy, as necessarily defeating his creditors. On this an exception has been engrafted, that the conveyance is not an act of bankruptcy, if it be for an equivalent; Baxter *v.* Pritchard, 1 A. & E. 456 (E. C. L. R. vol. 28), Rose *v.* Haycock, 1 A. & E. 460, note (*a*). The point in the present case is, whether a conveyance by way of pledge for an advance is for an equivalent, so as to bring it within the exception: but it is expressly decided in Hutton *v.* Cruttwell that it is. We ought not to overrule that decision, which I think lays down a rule consistent with the modern course of mercantile business. All merchants now raise money by pledge of their property; in times of pressure they often must bring every available thing to pledge; and, if they did do so by pledging their whole property in separate parcels to different

pledgees, the transactions would not be impeachable. It is difficult to see why the transaction should be invalid if all the property is included in one pledge to one person, if that be most convenient.

Then, if the transaction of this kind is not necessarily fraudulent as a matter of law, was this fraudulent in fact? I come to the conclusion that it was bonâ fide done as the most convenient way of raising as much money as could be got for the purpose of the trade, and not fraudulent in fact. Judgment for the defendants.

*SIEVEKING *v.* MAASS. *April* 30. [*312

THE decision in this case, in the Court of Queen's Bench, will be reported together with the decision of the Exchequer Chamber in the same case, June 3d, 1856.

HALHEAD and LORD *v.* YOUNG. *May* 1.

Declaration alleged that plaintiff had chartered a ship, then on her way to New York, to proceed to Quebec after discharging at New York, and to load at Quebec from plaintiff's factor a cargo of timber, and therewith proceed to Liverpool. That, at the time of such chartering, the ship was on her voyage to New York. That plaintiff contracted with R. of Quebec for the purchase of a cargo of timber. That the ship proceeded from New York to Quebec, for the purpose of loading the cargo, and, if she had not been lost, would have arrived at Quebec and loaded the cargo. The plaintiff directed his broker to effect a policy of insurance on the profits on such cargo. That the broker effected a policy, which defendant underwrote, "lost or not lost, at and from," then followed the written words "New York to Quebec, during the ship's stay there for any purpose, and back to Liverpool;" and then, in print, "beginning the adventure upon the said goods and merchandises from the loading thereof on board the said ship;" the ship, goods, and merchandises "shall be valued," then, in written words, "1000*l.*, on profit on cargo." That the ship, on her voyage from New York, and before reaching Quebec, was lost by the perils of the seas; that the cargo was awaiting her arrival at Quebec, and, in consequence of her loss, could not be shipped during the shipping season; and the profits were lost by the perils of the seas. On demurrer:

Held: that, the cargo never having been on board the ship, the policy never attached, and plaintiff could not recover from defendant, in an action thereon.

The declaration set forth a correspondence between plaintiff and his broker, which was alleged to have been made known to the defendant at the time of the effecting the policy, and from which (it was contended) it appeared that the intention had been to insure against the profits being lost by reason of a loss of the ship between New York and Quebec. It was further alleged that the premium was larger than the premium would have been for an insurance not covering such loss.

Held: that these circumstances could not be taken into consideration in interpreting the policy.

Where defendant demurs to the declaration and also pleads over, and plaintiff demurs to the plea, plaintiff has the right to begin.

THE declaration alleged that plaintiffs, using the name of Halhead, Fletcher & Company, on 9th *August, 1853, made with James [*313 Baines & Company a charter-party for chartering the ship Lady Bulwer. The declaration set out the charter-party, by which it was agreed by James Baines & Company, owners of the ship, then on her

way to New York, and plaintiffs, that the ship should proceed to Quebec after discharging at New York, and there load from the factors of plaintiffs a full and complete cargo of yellow pine timber, not exceeding, &c., and therewith proceed to Liverpool, and deliver the same on being paid freight at rates specified in the charter-party: the act of God, &c., always excepted. The declaration then alleged that, at the time of making the charter-party, the ship was on her outward voyage to New York, having sailed from Liverpool on 20th July, 1853. That, on 19th August, 1853, plaintiffs made a contract with Ritchie & Company, of Quebec, for the purchase of a cargo of timber. The declaration set out the contract, which was for a cargo of wood goods to load The Lady Bulwer; "said cargo to be delivered, as customary, on the arrival of the vessel at Quebec, and to consist," &c. The declaration then alleged that the ship proceeded to New York from Quebec "for the purpose of loading the said cargo, so purchased by the plaintiffs as aforesaid, in pursuance of the said charter-party and the said contract; and that the said ship, if she had not been lost in manner hereinafter mentioned, would have arrived at Quebec aforesaid, and loaded the said cargo in the shipping season of 1853." "That, for the purpose of insuring the said profits on the said cargo, they, the plaintiffs, directed their brokers, Messieurs Alfred Gibson & Company, to effect a policy of insurance on such profits valued at 1000*l.*" The declara-

*314] tion then stated the writing and *receipt of certain letters, extracts of which were set out verbatim, averred, in each instance, to be "the part material to the present action." They were, in substance, as follows.—4th November, 1853, from plaintiffs to Alfred Gibson & Company, directing them to insure on The Lady Bulwer's cargo at 3000*l.*, stating that, as the writers understood from the owners, she cleared from New York on 12th October, and directing the brokers, if they could not effect the above, at all events to effect insurance on profit on the cargo, valued at 1000*l.*; and similar directions as to another ship and cargo; "the ships having been chartered and the cargoes bought on most favourable terms."—7th November, 1853, Alfred Gibson & Company to plaintiffs, stating that the writers had been unsuccessful, owing to the uncertainty of the date of sailing from Quebec.—8th November, 1853, plaintiffs to Alfred Gibson & Company, stating that The Lady Bulwer could scarcely be at Quebec on 22d October, and adding: "we should also like you to insure the profit on The Lady Bulwer, 1000*l.*; this we believe is not unusual: suppose, for instance, the ship was lost going from New York to Quebec, we lose our profits; we want to cover this."—Answer by Alfred Gibson & Company to the preceding: "The Lady Bulwer we have done at 7*l.* 7*s.* per cent., the most moderate rate we could get her taken at, and have the pleasure to enclose policies for both vessels." The declaration then alleged "that, at the time of effecting the policy of insurance,

hereinafter mentioned, the defendant and the other underwriters of such policy had notice of all the premises." "That the said brokers, on the 9th of November, A. D. 1853, after fully explaining from the above letters to the defendant and the other underwriters on the said policy hereinafter *mentioned the nature of the risk intended to be covered, effected, as agents for the plaintiffs, and the defendant then subscribed, a policy of insurance; which said policy is the same of which a copy was enclosed in the said last-mentioned letter." [*315

The declaration then set out the policy, by which Alfred Gibson & Company as agent, "as well in *their* own name," &c., caused "*themselves* and them," &c., to be insured, lost or not lost, at and from *New York to Quebec, during the ship's stay there for any purpose, and back to Liverpool, including all risk of craft*, upon any kind of goods," &c., on the "vessel called The Lady Bulwer, whereof is master," &c., "beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship upon the said ship, &c., and so shall continue and endure during her abode there, upon the said ship, &c.; and further until the said ship, with all her ordnance," &c., "shall be arrived at ," &c.; "and upon the goods and merchandises until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever *and wheresoever, including risk of towing by steamer*, without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concern the assured, by agreement between the assured and assurers, in this policy are and shall be valued 1000*l. on profit on cargo so valued.*" The perils insured against were stated, in the usual terms, to be of the seas, &c., and all other perils, &c., "that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, ship, &c., or any part thereof." Averment: "that the words of the said policy copied *above in red ink(*a*) are written in the original policy; and the rest of the policy is printed." [*316

The declaration then alleged: "that the rate of 7*l.* 7*s.* per cent., at which the said policy was effected, was a higher rate than would have been charged, or was then chargeable, for a similar risk commencing at Quebec, or for a risk on goods only for the said voyage in the said charter-party and policy mentioned." That defendant became an insurer at 150*l.*, "upon the premises in the said policy in that behalf mentioned." "That the ship sailed on her said voyage from New York aforesaid to Quebec aforesaid, on the 15th of October, A. D. 1853, for the purpose of loading the above cargo, and was, on the 10th of November, 1853, wholly lost by the perils of the seas on her said voyage, and before reaching Quebec aforesaid." "That, at the time of such

(a) These words are printed in italics in the text. Some allegations verifying certain immaterial erasures are omitted, with some other stipulations not affecting the point decided.

loss, and at the time when the said ship would have arrived at Quebec aforesaid, in the ordinary course of such voyages, the said cargo, so purchased by the plaintiffs as aforesaid, was lying at Quebec aforesaid, ready for shipment on board the said ship, and was there awaiting her arrival for that purpose; and the said Messrs. Ritchie & Company intended to ship the said cargo, and would have shipped the same, by the said ship for conveyance to Liverpool aforesaid if she had duly arrived at Quebec aforesaid on her said voyage." "That, in consequence of the said ship having been so lost as aforesaid, and there being no other ship procurable at Quebec during the season to convey the said cargo to Liverpool aforesaid, the plaintiffs were prevented from shipping the said cargo at Quebec aforesaid during the shipping season of 1853, *according to their said contract." "That the said profits, so insured as aforesaid, then became and were, by perils insured against by the said policy, that is to say, by the said perils of the seas, wholly lost to the plaintiffs." "That they, the plaintiffs, at the time of the loss of the said ship as aforesaid, were interested in the said cargo and the profits thereof to the extent of the sum insured on such profits; and they had just reason to expect, and did expect, that they would, by means of the arrival of the said goods at Liverpool aforesaid, and the sale thereof, make and realize a profit thereon to the amount aforesaid; and they would have made and realized such profits if the said goods had not been prevented from arriving at Liverpool aforesaid in manner hereinbefore mentioned." "That, by reason of the said ship having been so lost by perils of the seas, and of the plaintiffs having been thereby prevented as aforesaid from loading the said cargo at Quebec aforesaid, during the shipping season of 1853, the said contract with the said Messieurs Ritchie & Company for purchase of the said cargo terminated and was dissolved; and the said cargo never was conveyed to England; and no profits were ever realized by the plaintiffs thereon." "That, although all things and conditions whatsoever have happened and been performed in order to entitle the plaintiffs to recover from the defendant the said sum of 150*l.* so insured by him as aforesaid, yet the defendant has not paid the said sum of 150*l.*, or any part thereof."

*317]

Demurrer. Joinder.

The defendant also pleaded five pleas. The plaintiffs took issue on all these pleas, and also demurred to the fifth plea. The defendant joined in demurrer.

*The case was argued on an earlier day in this Term.(*a*)

*318]

Wilde, for the defendant, claimed to begin, as having demurred first.(*b*)

(*a*) April 25th. Before Lord Campbell, C. J., Erle and Crompton, Js. Wightman, J., left the Court early in the argument.

(*b*) See Hilton *v.* Earl Granville, 5 Q. B. 701, 710 (E. C. L. R. vol. 48); Robson *v.* Oliver, 10 Q. B. 704, 710 (E. C. L. R. vol. 59).

Hugh Hill, for the plaintiffs, cited Bourne *v.* Seymour, 16 Com. B. 337, 342 (E. C. L. R. vol. 71), where the Court of Common Pleas had ruled otherwise. [*Phipson*, amicus Curiæ.—This Court has acted upon that.]

Lord CAMPBELL, C. J.—It seems that, according to the latest decision, counsel for the plaintiffs is entitled to begin.

Hugh Hill, for the plaintiffs.—The question arises on the declaration. And the first point is, whether the interest of the plaintiffs in the profits of the cargo be an insurable interest; the second, whether the policy had attached before the loss. The defendant denies that the interest was insurable. But it is an interest which possesses a legal certainty. The contract for the goods was made; the goods were awaiting the arrival of the ship; and the allegations in the declaration show a reasonable certainty of profit. [Lord CAMPBELL, C. J.—A profit depending on what?] On the arrival of the ship at Quebec. Barclay *v.* Cousins, 2 East, 544, shows that such an interest is insurable; and that case is referred to, as establishing the principle, in Arnould On the Law of *Marine Insurance, vol. 1, p. 204. [*Wilde*, for the defendant, admitted that such an interest, generally, was insurable; but said that he should contend that the profits of the cargo were not insured from New York to Quebec by this instrument, and that the policy had not attached.] On behalf of the defendant, Royal Exchange Assurance *v.* M'Swiney, 14 Q. B. 646 (E. C. L. R. vol. 68),(*a*) will be cited. There the Court of Exchequer Chamber held that the profits of a cargo were insurable: but that profit on the goods not shipped could not be said in that case to be insured, nor such profit to be lost by perils of the sea, on account of the ship itself having been lost by perils of the sea, and the shipping having thus become impossible. But there the declaration stated only that the goods were supposed to have been shipped, which in fact they were not; whereas here the exact state of things contemplated at the time of the policy, namely that the goods were awaiting the arrival of the ship, was known to all parties, and was the foundation of the contract. Nor did it appear there, as it does here, that an additional premium had been paid on account of the peculiar nature of the risk, a circumstance upon which much stress is laid in the judgment of the Court of Exchequer Chamber.(*b*) A policy on the freight of goods for a given voyage is somewhat analogous to this policy; and there the insurance is payable though the ship be lost before the goods are on board, if the ship has started upon the contract to take the goods on board; Thompson *v.* Taylor, 6 T. R. 478, Horncastle *v.* Suart, 7 East, 400. It is to be *observed that in Royal Exchange Assurance *v.* M'Swiney much stress was laid on the printed words of the policy: this declaration distinguishes what is

[*319

[*320

(*a*) In Exch. Ch., reversing the judgment of Q. B. in M'Swiney *v.* Royal Exchange Assurance, 14 Q. B. 634.

(*b*) 14 Q. B. 660 (E. C. L. R. vol. 68).

printed; and the printed words are frequently considered as immaterial, at any rate to be controlled by the written words. [ERLE, J.—That is, I presume, where the printed words are unintelligible, or inconsistent with the rest of the policy.] In Royal Exchange Assurance *v.* M'Swiney there were no special facts explaining the contract: here the correspondence, which is on the record, shows the understanding of the parties. [Lord CAMPBELL, C. J.—You will have to show, in the course of your argument, that we can legitimately look to the correspondence for the purpose of varying the subsequent written contract.] Of explaining it; not of varying it. The profit to be derived by a shipowner for conveying his own cargo may be insured as freight, and is protected by the policy, though the ship be lost before the cargo be on board; Devaux *v.* J'Anson, 5 New Ca. 519 (E. C. L. R. vol. 35).

The plaintiffs will not insist on the demurrer to the fifth plea.

Wilde, contrà.—The law as to insurance of freight is not in dispute: the question here is on a very different insurance. In the first place, it has not been shown that the correspondence can be looked to for the purpose of construing the policy. [Lord CAMPBELL, C. J.—A contract may be explained by the accompanying facts.] But it cannot be qualified by conversations or other negotiations. In Goldshede *v.* Swan, 1 Exch. 154,† where a written guarantee was explained by collateral evidence, the evidence was of a *state of facts, not of an understanding between the parties qualifying or explaining the contract. The declaration here goes no further than to aver that the underwriters had notice of what had passed: it is not said that the policy was made in pursuance of the letters: it may well be that the previous arrangements, if there were any, were intentionally rejected when the policy was made. Then, as to the policy. An insurance on profits is, in effect, an insurance on part of the goods. [CROMPTON, J. —It seems that the real contest between you is, whether the insurance on profit is, like that on freight, on an incident to the ship, or on an incident to the goods.] This policy, if substantially distinguishable from that in Royal Exchange Assurance *v.* M'Swiney, is the less favourable of the two to the insured; here it is on "profit on cargo:" there it was on "profit on rice." The adventure is "at and from New York to Quebec, during the ship's stay there for any purpose, and back to Liverpool," "beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship." There is a class of cases in which it has been considered that, where the adventure is so limited, goods put on board before the arrival at the place named are not covered by the policy; Spitta *v.* Woodman, 2 Taunt. 416, Langhorn *v.* Hardy, 4 Taunt. 628, are such cases. Now the insurance on profits, which has been called an excrescence on goods,(*a*)

*321]

(*a*) See Eyre *v.* Glover, 16 East, 220. Also Parke, B., in Stockdale *v.* Dunlop, 6 M. & W. 232.†

must be on the same footing in this respect as an insurance on the goods themselves. The plaintiffs contend that simply the gain is insured; and, *according to that interpretation, there might be a recovery on the policy even if the loss arose simply from a favourable market having been missed by the retardation of the voyage: and it may be that a policy might be so framed as to embrace such a risk. But this policy is not so framed. In Knox *v.* Wood, 1 Campb. 543, the commission on the freight of a cargo to be taken in at Jamaica was insured; the ship was captured before reaching Jamaica: and it was held that the assured could not recover. In Stockdale *v.* Dunlop, 6 M. & W. 224,† the plaintiff had insured the profits of goods for which he had made only a verbal contract, which could not be enforced; and, the goods not having been delivered to him by reason of the loss (by perils of the seas) of the vessel on which they were, it was held that he could not recover in respect either of the goods or the profits. And there insurance on profits was distinguished from insurance on freight. Now here the risk from New York must be at any rate a risk upon the profit of goods put on board at New York. This is an insurance on "cargo." The policy could not be intended to cover, for instance, a loss by fire on shore. Besides, the goods actually exist in specie: as to them, there has been no loss, except of the voyage. [*322

Hugh Hill, in reply.—As to the point first mentioned. It is not sought, by the collateral evidence, to add to, or otherwise vary, the contract. Evidence only of facts within the knowledge of the parties is offered, for the purpose of applying the terms of the contract itself. The declaration, it is true, does not say, in so many words, that the contract was made on the understanding *shown by the letters: but it shows facts, such as the rate of premium, from which the application of the language of the contract is to be inferred. As to the other point. In Stockdale *v.* Dunlop, 6 M. & W. 224,† issue was joined on the interest of the assured in the profits: and, as they had no interest in the goods which could be enforced, they failed. In Knox v. Wood, 1 Campb. 543, no cargo was ready, as pointed out in Park's System of the Law of Marine Insurances, ch. xiv. s. 6 (vol. 2, p. 564, ed. 8), and in the judgment of this Court in M'Swiney *v.* Royal Exchange Assurance, 14 Q. B. 645 (E. C. L. R. vol. 68). In King *v.* Glover, 2 New R. 206, the master of a ship recovered upon his insurance on his commission upon slaves to be purchased by him. It seems to be argued that a party recovering on a policy insuring freight recovers, in fact, upon the loss of the ship, whereas profit on cargo can be insured only where the goods come on board, so as to become cargo. But an insurance on freight may be recovered upon though the ship is not lost, as where the goods are damaged and sold in consequence; 2 Arnould, 1049, citing Vlierboom *v.* Chapman, 13 M. & W. 230.† [*323

Cur. adv. vult.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

On the demurrer to the declaration we think that we are bound to give judgment for the defendant.

The question is, Whether, there being a marine policy of insurance in the usual form at and from one named *port to another named *324] port, during the ship's stay there, and thence to an ultimate port of destination, "on profit on cargo," the ship being lost by perils of the sea in proceeding from the first named port to the second before any cargo was loaded in her by the assured, the underwriters are liable in respect of a cargo which the assured had purchased and provided to be loaded in her at the port secondly named, to be carried in her to the ultimate port of destination. If the profits of the purchasers of such goods depend upon the contingency of a particular ship carrying them on a particular voyage and safely delivering them at the port of destination, a policy might probably be framed to indemnify the assured from the loss of profits caused by the ship being lost before she reaches the port of loading. But the policy which we have to construe is in truth on goods, "beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship." "Profit on cargo" means the improved value of the cargo when it has been landed at its destined port. This is not an insurance on the ship, but on goods on board the ship when loaded. The goods might have been loaded at New York or Quebec; and from the loading thereof aboard the ship the adventure would have begun. But, as no goods ever were loaded aboard her by the assured, the adventure never did begin; or, in other words, the loss of the ship happened before the policy attached: so that the underwriters are not liable. The goods remaining safe at Quebec, another vessel might possibly have been obtained to bring them on to Liverpool as speedily as The Lady Bulwer would have done: and this policy cannot be extended to cover *a loss arising from the *325] retardation in the conveyance of the goods, or to a loss arising from the charter-party by which The Lady Bulwer was hired not being fulfilled. We are relieved from discussing the various authorities upon this subject by the recent decision of the Court of Exchequer Chamber in Royal Exchange Assurance *v.* M'Swiney, 14 Q. B. 646 (E. C. L. R. vol. 68), which we consider to be expressly in point. The policy there was on "profit on rice;" and it was held to attach only on rice actually loaded, not on rice provided and intended to be loaded on board the ship.

We are further of opinion that the construction of the policy in the present case cannot be varied by the correspondence set out in the declaration between the plaintiffs and their agents who effected the insurance. The policy does not refer to this correspondence: and the declaration, having alleged that the underwriters had notice of the correspondence, and that the nature of the intended risk was explained to

them, does not allege that the correspondence formed any part of the contract between the parties. This communication, although of written documents, could no more convert the document which did constitute the contract from being a policy on goods into a policy on the ship than would a verbal statement of the wishes and intention of the assured.

Reliance was likewise placed upon the allegation that the rate of 7*l.* 7*s.* per cent., at which the said policy was effected, was a higher rate than would have been charged, or was then chargeable, for a similar risk commencing at Quebec, or for a risk on goods only for the *said voyage. But we are clearly of opinion that the construction of the policy cannot be varied by the amount of the premium. Parke, B., in delivering the judgment of the Court in Royal Exchange Assurance *v.* M'Swiney, does observe that, "If such an assurance had been made on this peculiar interest, against all these events, it is obvious that the underwriters would have required a much larger premium for insuring so complicated a risk than for an ordinary insurance by an owner on goods or profit on goods, which would be liable to loss only by perils of the seas or other accidents happening to the goods themselves." But this very learned Judge cannot be supposed to intimate an opinion that, on proof that the premium actually received by the underwriters would have been adequate to the risk incurred by them according to the contention of the assured, he would have put a different construction on the same words. [*326

The demurrer to the last plea having been abandoned, we have upon the whole record to give judgment for the defendant.

Judgment for defendant.

---

*IN THE EXCHEQUER CHAMBER. [*327

(Error from the Court of Queen's Bench.)

The ROYAL BRITISH BANK *v.* TURQUAND. *May* 1.

Plaintiff declared against defendants, a joint stock Company completely registered under stat. 7 & 8 Vict. c. 110, on a bond, signed by two directors, under the seal of the Company, whereby the Company acknowledged themselves to be bound to plaintiff in 2000*l.*

The plea set out the condition, which appeared to be for securing to the plaintiff, who was a banker, such sum as the Company should, to the amount of 1000*l.*, owe to plaintiff on the balance of the account current, from time to time, and for indemnifying plaintiff to that amount from losses incurred by reason of the account between plaintiff and defendants. The plea further set out clauses of the registered deed of settlement, by which it appeared that the directors were authorized, under certain circumstances, to give bills, notes, bonds, or mortgages: and one clause provided that the directors might borrow on bond such sums as should, from time to time, by a general resolution of the Company, be authorized to be borrowed. The plea averred that there had been no such resolution authorizing the making of the bond, and that it was given without the authority of the shareholders.

The replication set out the deed of settlement further, by which it appeared that the Company was formed for the purpose of carrying on mining operations and forming a railway.

On demurrers to the plea and replication, held, by the Court of Exchequer Chamber, affirming

the judgment of Q. B., that plaintiff was entitled to judgment, the obligee having, on the facts alleged, a right to presume that there had been a resolution at a general meeting, authorising the borrowing the money on bond.

***Semble*, per Jervis, C. J., that such resolution would confer sufficient authority if it authorized the borrowing on bond of such sums as the directors might deem expedient, in accordance with the statute and deed, without otherwise defining the amount.**

THE plaintiffs declared against the defendant, as official manager of Cameron's Coalbrook Steam, Coal, and Swansea and London Railway Company, according to The Joint Stock Companies Winding-up Acts (the Company being completely registered under stat. 7 & 8 Vict. c. 110). The declaration alleged that the Company, before defendant became official manager, to wit, on 6th March, 1850, by their writing obligatory, sealed with their common seal, acknowledged themselves to be held and firmly bound to plaintiffs in 2000*l.*, to be paid to plaintiffs on request; for which payment the *said last-mentioned Company did bind themselves and their successors. Yet the said sum, or any part thereof, has not been paid.

*328]

Plea (1), in which was set out the condition, which appeared to be for securing to the plaintiffs, who were bankers, such sum as the Company should, to the amount of 1000*l.*, owe to plaintiffs on the balance of the account current, from time to time, and for indemnifying plaintiffs to that amount from losses incurred by reason of the account between plaintiffs and the Company. The plea further set out clauses of the registered deed of settlement of the Company, by which it appeared that the directors were authorized, under certain circumstances, to give bills, notes, bonds, or mortgages: and one clause provided that the directors might borrow on bond such sums as should, from time to time, by a general resolution of the Company, be authorized to be borrowed. The plea averred that there had been no such resolution authorizing the making of the bond, and that the same was given and made without the authority or consent of the shareholders of the Company.

The replication set out the deed of settlement further, by which it appeared that the Company was formed for the purpose of carrying on mining operations and forming a railway. It then alleged that, at a general meeting of the Company, it was resolved "that the directors of the said Company should be, and they were thereby, authorized to borrow on mortgage, bond, or otherwise, such sums for such periods and at such rates of interest as they might deem expedient, in accordance with the provisions of the deed of settlement and Act of Parliament. And the said resolution and determination has thence hitherto remained unrescinded." The replication then alleged that afterwards, in accordance with the authority *granted by the general meeting, the directors agreed to enter into the bond, and appointed two directors to affix their seal, and the secretary to sign the bond, which bond, so sealed and signed, plaintiffs took "in full faith and belief of the validity of the said resolutions, and that the said bond

*329]

was authorized by, and would be a valid and binding security upon, the said Company."

The plaintiffs also demurred to the plea. The defendant joined in demurrer, and also demurred to the replication. Joinder.

In last Trinity Term, judgment was given for the plaintiffs in the Court of Queen's Bench; Royal British Bank *v.* Turquand, 5 E. & B. 248 (E. C. L. R. vol. 85).(*a*)

The defendant suggested error on this judgment in the Court of Exchequer Chamber: which the defendant denied.

The case was now argued.

Phipson, for the party suggesting error (defendant below).—The plea answers the declaration; it amounts to a special Non est factum. Stat. 7 & 8 Vict. c. 110, s. 25, limits the powers of the Company to the acts which are authorized by the deed of settlement; and here the deed of settlement limits the power of borrowing on bond by the directors to cases where such borrowing is authorized by a resolution passed at a general meeting of the Company. The plea alleges that there has been no such resolution. The bond therefore, being sealed without authority, is not the bond of the Company. The Court below assumes that the bond is allowed to be under the seal of the Company, and to be their bond: whereas the plea insists that this is not so. The ground therefore, suggested by *the Court below, of distinction between this case and Ridley *v.* Plymouth Grinding and Baking Company, 2 Exch. 711,† Kingsbridge Flour Mill Company *v.* Plymouth Grinding and Baking Company, 2 Exch. 718,† Smith *v.* The Hull Glass Company, 11 Com. B. 897 (E. C. L. R. vol. 73), and Greenwood's Case, 3 De G. Macn. & G. 459, disappears. The judgment below states that no illegality appears on the face of the bond or condition, and infers from Collins *v.* Blantern, 2 Wils. 341,(*b*) and Paxton *v.* Popham, 9 East, 408, that the plea should allege facts showing illegality. But in those cases it was admitted that the bond was duly executed, and the plea was by way of confession and avoidance. [BRAMWELL, B.—I think that, in The East Anglian Railways Company *v.* The Eastern Counties Railway Company, 11 Com. B. 775 (E. C. L. R. vol. 73),(*c*) I urged, without success, the argument that the deed was admitted, on the record, to be the deed of the defendants.] And there the covenant was under the common seal. The defendants have no power besides what the statute confers; and the statute refers to the deed: the case is not like that of ordinary partners, each of whom has a primâ facie authority to bind the firm in matters relating to the business of the firm; an authority which cannot, as against other parties, be restrained by a private agreement among the partners themselves. The plaintiffs were

[*330

(*a*) Where the pleadings are more fully set out.
(*b*) See note to S. C., 1 Smith's Lea. Ca. 278 (4th ed.)
(*c*) See pp. 785, 786.

bound to know the statute and the contents of the deed of settlement. [Crowder, J.—That appears to be the view of Parke, B., in Ridley *v.* Plymouth Grinding and Baking Company.] The same view is taken by Jervis, C. J., and Maule, J., in Smith *v.* The Hull Glass Company; *331] though there *judgment was given for the plaintiffs on the ground that the goods were supplied for the purposes of the trade of the defendants, and were, with their knowledge, received and so used. [Bramwell, B.—Suppose all the members of the Company had joined in affixing the seal.] The affixing would not be an act of the Corporation. The judgment below relies upon Hill *v.* The Manchester and Salford Water Works Company, 2 B. & Ad. 544 (E. C. L. R. vol. 22), and Horton *v.* Westminster Improvement Commissioners, 7 Exch. 780.† But in Hill *v.* The Manchester and Salford Water Works Company the company were authorized to raise a certain sum; there was no statutory restriction as to the modes of executing the powers; and there was nothing to show that all the shareholders had not been parties to the instrument. In Horton *v.* Westminster Improvement Commissioners the decision on the seventh plea was on the language of the plea, which did not bring the defence within the words of the statute.

The replication does not satisfy the condition imposed by the deed of settlement, inasmuch as the resolution set forth does not specify the sum to be borrowed.

Bovill, contrà, was not called upon.

Jervis, C. J.—I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. I incline to think that the question which has been principally argued both here and in that Court does not necessarily arise, and need not be determined. My impression is (though I will not state it as a fixed opinion) that the resolution set *332] forth in the replication *goes far enough to satisfy the requisites of the deed of settlement. The deed allows the directors to borrow on bond such sum or sums of money as shall from time to time, by a resolution passed at a general meeting of the Company, be authorized to be borrowed: and the replication shows a resolution, passed at a general meeting, authorizing the directors to borrow on bond such sums for such periods and at such rates of interest as they might deem expedient, in accordance with the deed of settlement and the Act of Parliament; but the resolution does not otherwise define the amount to be borrowed. That seems to me enough. If that be so, the other question does not arise. But whether it be so or not we need not decide; for it seems to us that the plea, whether we consider it as a confession and avoidance or a special Non est factum, does not raise any objection to this advance as against the Company. We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they

are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done.

POLLOCK, C. B., ALDERSON, B., CRESSWELL, J., CROWDER, J., and BRAMWELL, B., concurred. Judgment affirmed.

*IN THE EXCHEQUER CHAMBER. [*333

(Error from the Court of Queen's Bench.)

JOHN COWIE, Administrator of JOHN STORM, deceased, *v.* EDWARD STIRLING. *May* 1.

Defendant signed, and delivered to plaintiff, a written instrument in the following words: "Nine months after date, I promise to pay to the secretary for the time being of The Indian," &c., "Society, or order, Company's rupees, twenty thousand, with interest at the rate," &c.; "and I hereby deposit in his hands twenty-two Union Bank shares," "by way of pledge or security for the due payment of the said sum of Company's rupees, twenty thousand, as aforesaid; and, in default thereof, hereby authorize the said secretary for the time being, forthwith, either by private or public sale, absolutely to sell or dispose of the said twenty-two Union Bank shares, so deposited with him; and out of the proceeds of sale to reimburse himself the said loan of Company's rupees, twenty thousand, and interest thereon, as aforesaid, he rendering to me any surplus which may be forthcoming from such sale. And I hereby promise and undertake to make good whatever, if anything, may be wanting over and above the proceeds of such sale, to make up the full amount of the said loan of Company's rupees, twenty thousand, and interest as aforesaid."

Plaintiff, at the time of the making and delivering of this paper, and thenceforward continually till the expiration of the nine months, and ever since, had been secretary of the Society. An action having been brought by him against defendant, after the expiration of the nine months, as upon a promissory note, the declaration averring the plaintiff to have been and to be secretary as aforesaid, and the defendant having denied making "the alleged promissory note:"

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Q. B., that the instrument was not a promissory note, the payee being uncertain at the time of the making.

JOHN STORM sued the defendant, Edward Stirling, in the Court of Queen's Bench. The first count alleged that, whereas defendant, on 10th March, 1845, in parts beyond the seas, to wit, at Calcutta in the East Indies, made his promissory note in writing, and thereby promised to pay to the secretary for the time being of The Indian Laudable and Mutual Assurance Society twenty thousand Company's rupees, with interest at the rate of six per cent. per annum, nine months after the date thereof, which period, and the time for payment of the said note, had expired before the commencement of *this suit; and then [*334 delivered the said note to the plaintiff, who, at the time of the making of the said promissory note and from thence hitherto, was and is the secretary of the said Indian Laudable and Mutual Assurance Society: averment that the said sum of twenty thousand Company's

rupees was and is of great value, to wit, of 2000*l.* of lawful, &c.: breach: non-payment.

Plea to this: that defendant "did not make the alleged promissory note."

The plaintiff took issue on this plea. There were also other issues of fact.

On the trial, before Crompton, J., at the Middlesex sittings in Michaelmas Term, 1853, a special verdict was found: of which the parts now material were as follows.

As to the first issue. That the defendant, at a certain place, &c. (as in the declaration), made and signed, and delivered to the plaintiff, a document in the words and figures following, that is to say:

"C. 20,000. "Calcutta, 10th March, 1845.

"Nine months after date, I promise to pay to the secretary for the time being of The Indian Laudable and Mutual Assurance Society, or order, Company's rupees, twenty thousand, with interest at the rate of six per cent. per annum. And I hereby deposit in his hands twenty-two Union Bank shares, as particularized at foot by way of pledge or security for the due payment of the said sum of Company's rupees, twenty thousand, as aforesaid; and, in default thereof, hereby authorize the said secretary for the time being, forthwith, either by private or public sale, absolutely to sell or dispose of the said twenty-two Union Bank shares, so deposited with him; and out of the proceeds of sale to reimburse himself *the said loan of Company's rupees, twenty thousand, and interest thereon, as aforesaid, he rendering to me any surplus which may be forthcoming from such sale. And I hereby promise and undertake to make good whatever, if anything, may be wanting over and above the proceeds of such sale, to make up the full amount of the said loan of Company's rupees, twenty thousand, and interest as aforesaid. "EDWD. STIRLING."

*335]

(Then followed the numbers of the shares.)

"No. 33. Due 10/13 Dec. /45."

That the Indian Laudable and Mutual Assurance Society, in the said document mentioned, is The Indian Laudable and Mutual Assurance Society within in the declaration mentioned; and that the plaintiff, at the time of the making of the said document, and from thence until the time of the commencement of the within-mentioned action, was the secretary of the said Society. That the name Edward Stirling, set and subscribed to the said document, is of the proper handwriting of the defendant. That the said sum of twenty thousand Company's rupees, at the time of the making of the said document, and when the same became due, was of the value of 2000*l.* of lawful money of Great Britain. The special verdict then left the first issue to the Court in the usual form.

The findings on the other issues were immaterial to the question now decided.

Judgment was given in the Court of Queen's Bench for the defendant, in Trinity Term, 1854; Storm *v.* Stirling, 3 E. & B. 832 (E. C. L. R. vol. 77).

John Cowie, the administrator, with the will annexed, *of the plaintiff below, suggested error in the Court of Exchequer Chamber: which the defendant denied. [*336

The case was now argued.

Lush, for the party suggesting error (administrator of plaintiff below). —The judgment of the Court below proceeds on the ground that the instrument is not a promissory note because the money is not made "payable to any certain person, but to the person, if any, who at the time when the note should become payable might fill the situation of secretary to the Company." It is true that the expression "secretary for the time being" would, if standing alone, be ambiguous. But then follows the statement, "I hereby deposit in his hands twenty-two Union Bank shares," &c.: that shows that, by the secretary for the time being, is designated the secretary at the moment of making the note and depositing the shares: and this is enough, without any name. The additional words, "for the time being," would not destroy the effect of what had preceded; Wise *v.* Charlton, 4 A. & E. 786 (E. C. L. R. vol. 31): if they did, they would be rejected, ut res magis valeat quam pereat. The then actual secretary is "the said secretary" who is authorized to sell the shares; and the contingency of his ceasing to be secretary is provided for by the note being made payable to order: the person taking the note might endorse it over forthwith.

C. E. Pollock, contrà.—The promise is to pay nine months after the date of the note. The promise is therefore *either to pay the person who shall be secretary nine months thereafter, or to pay the present secretary if he shall be secretary at the expiration of that time. On either interpretation the note is bad, as a promissory note, for uncertainty. It cannot be contended that John Storm, had he ceased to be secretary at the maturity of the note, could then have sued on it. The maxim, ut res magis valeat quam pereat, is sound: but it is outweighed by the importance of not introducing uncertainty into mercantile negotiable instruments. (He was then stopped by the Court.) [*337

Jervis, C. J.—I am clearly of opinion that this judgment should be affirmed. Whatever desire we may feel to aid in enforcing a contract, we must hold that, to make a promissory note, there must be a payee ascertained by name or designation. Now, as was said in the Court below, this money is made payable, not to the then secretary, but to the person who should be secretary nine months thence, when the payment was to be made. That was the clear intent. As to the shares being

deposited in the hands of the present secretary, that is merely for security. The payment itself is to be made to the person who shall be secretary. So that, even if we look at the collateral agreement (which I think we cannot do), we find no certain payee.

POLLOCK, C. B., ALDERSON, B., CRESSWELL, J., and CROWDER, J., concurred. Judgment affirmed.

*338] *IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

FORTUNATUS EDMUND ANDREWES *v.* JOHN ELLIOTT.

May 1.

It appeared by the record that plaintiff and defendant pleaded to issue, and a jury venire went; and the postea stated that afterwards, at, &c., at the assizes then holden, &c., before Sir W. W., Justice of Q. B., and Sir C. C., Justice of C. B., "and other their fellow Justices assigned to take the assizes, in," &c., "come the parties," &c., "for the trial of the said issues. And thereupon, the said parties having, by consent of themselves, their attorneys and counsel, in open Court then given, left the decision of the said issues to the Court, it was ordered by Sir W. W., knight, one of the aforesaid Justices, that such trial should be allowed. And thereupon G. W. W. B., Esq., one other of the Justices aforesaid, did proceed to hold such trial, and did decide" certain of the issues, going to the whole cause of action, "within joined, in favour of the defendant, and" certain others "in favour of the plaintiff." Then followed judgment for the defendant, to go without day and recover his costs, and award of execution for such costs.

Held, in Exch. Ch., on error from Q. B., that the judgment appeared to be right, although there appeared no written consent as required in the case of a proceeding under sect. 1 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125).

THE plaintiff declared against the defendant in the Court of Queen's Bench. The declaration contained two counts. The defendant pleaded five pleas: (1) To the whole action; (2) To the first count; (3) To the first count; (4) To part of the first count; (5) To the second count. Issue was joined on all the five pleas. After the jury venire, the postea in the Court below was as follows.(*a*)

"Afterwards, on the 6th day of August, in the year of our Lord 1855, at Croydon, in the county of Surrey, at the assizes there holden, in and for the said county, before Sir William Wightman, Knight, one of Her Majesty's Justices of the Court of Queen's Bench, and Sir Cresswell Cresswell, Knight, one of Her Majesty's *Justices of the Court of Common Pleas, and other their fellow justices assigned to take the assizes in and for the county of Surrey, come the parties within mentioned, by their respective attorneys within mentioned, for the trial of the said issues. And thereupon the said parties having, by consent of themselves, their attorneys and counsel, in open Court then given, left the decision of the said issues to the Court, it

*339]

(*a*) See Andrews v. Elliott, 5 E. & B. 502 (E. C. L. R. vol. 85).

was ordered by Sir William Wightman, Knight, one of the aforesaid Justices, that such trial should be allowed. And thereupon George Williams Wilshere Bramwell, Esquire, one of Her Majesty's counsel, and one other of the justices aforesaid, did proceed to hold such trial, and did decide the 1st, 2d, and 4th issues, within joined, in favour of the defendant, and the 3d and 5th issues, within joined, in favour of the plaintiff. Therefore it is considered that the plaintiff take nothing by his said writ, but that he be in mercy, &c. And that the defendant do go thereof without day, &c. And it is further considered, by the Court here, that the defendant do recover against the plaintiff 38*l*. 16*s*. for his costs and charges, by him about his defence," &c.: execution for the costs awarded.

The plaintiff below suggested error on this judgment, in the Court of Exchequer Chamber; which the defendant denied.

The case was now argued.

The party suggesting error (plaintiff below), in person.—The postea does not show any "consent in writing" to the decision being left to the Court, as is requisite to give jurisdiction, by The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), sect. 1. The Court will *not inquire whether there be any breach of faith in taking this objection; the whole circumstances are not before them; and the record alone can be looked at. [JERVIS, C. J.—You might have referred the case to Mr. Bramwell, without writing. POLLOCK, C. B.—It is very common to consent to a trial by eleven jurymen: no consent in writing is necessary for that purpose.] But the jurisdiction here arises only under the statute, which requires a consent in writing. [ALDERSON, B.—In a case under that section, a record would be sent down without any jury process at all: this is altogether a different proceeding.] Consent cannot give jurisdiction. It is true that a Judge might, if he and the parties pleased, sit as an arbitrator; but then his decision would take effect as an award, and would not authorize a postea and judgment in this form. There would be no authority to order a verdict to be entered, unless that were expressly contained in the submission. [*340

Lush, contrà, was not called upon.

JERVIS, C. J.—I am of opinion that the judgment of the Court of Queen's Bench should be affirmed.

POLLOCK, C. B., ALDERSON, B., CRESSWELL, J., and CROWDER, J., concurred.

WILLES, J.—Nothing appears on the record showing ground for invalidating this judgment: the case comes under the rule that consensus tollit errorem.

Judgment affirmed.

*341] *REUTER *v.* THE ELECTRIC TELEGRAPH COMPANY.

May 2.

A company were incorporated by Royal charter for trading purposes. By the deed of settlement, the directors were to manage the business of the Company; but all contracts, above a certain value, were to be signed by at least three individual directors, or sealed with the seal of the Company under the authority of a special meeting.

Plaintiff sued the Company on an agreement above the prescribed value. It was within the scope of the Company's business, and was made by parol with the chairman, who, with his own hand, entered a memorandum of it in the minute book of the Company. It was recognised in correspondence with the secretary; plaintiff did work under it, and received payments by checks for it. These payments passed into the accounts of the Company, and were audited and allowed; but there never was any contract signed by three directors, or under the seal of the Company. On a case stating these facts, with power to draw inferences of fact,

Held, that the contract was ratified, if not authorized, by the Company, and binding.

THE matters in difference in this cause were, by order of a Judge, referred to a barrister. Amongst other provisions in the order of reference, it was agreed that no objection should be raised on the ground that a particular contract was made, not with the defendants, but with The International Telegraph Company. The arbitrator made an award in favour of the plaintiff for 300*l.*; and, in his award, awarded in addition 217*l.*, if the Court should be of opinion, on a case stated in the award, that this contract was binding on The International Telegraph Company. This case proving not to be stated with sufficient distinctness to enable the Court to form a judgment, a supplemental case was, by order of the Court, agreed on by the parties, in which the facts were stated, and power was given to the Court to draw inferences.

The statements in the award and the supplemental case, so far as are material to the points decided, were, in substance: That The International Telegraph Company was incorporated by Royal Charter, bearing date 29th July, 1853, for the purpose of establishing telegraphic communications between Great Britain and other *countries by means *342] of a submarine telegraph to Holland. The charter directed that the business of the Company should be carried on according to the provisions of a deed of settlement, which it required to be prepared and executed. The charter contained provisions for securing to Her Majesty's Government the use of the telegraph for state purposes; and the following proviso: "Provided always, and this Our Royal Charter is upon the express condition that, subject to the aforesaid provisions giving Us and Our aforesaid officers on Our behalf as aforesaid the prior right to use such telegraph as aforesaid for Our service, such telegraphs shall be open for the sending and receiving of messages by all persons alike, without favour or preference, and subject to such equitable charges and to such reasonable regulations as may from time to time be made by the said Company."

The deed of settlement provided for the appointment of directors, and contained the following stipulation. "The directors shall conduct

and manage the affairs of the Company, and shall exercise all the powers which may be exercised by the Company at large, and shall fulfil all the duties of the Company, except such powers and duties as are reserved to general meetings by these presents or the said charter." It contained also provisions for the election of a secretary, who was to have the actual custody of the seal of the Company, and of the books, and was to act under the control of the directors. It contained also the following provisions. "Contracts, other than bills of exchange or promissory notes, for the purchase of any article the consideration for which does not exceed 50*l*., or for any labour or services, the duration or period of which does not exceed *six months, nor the consideration-money 50*l*., may be entered into on behalf of the Company by any officer authorized by the directory. Contracts for the purchase or sale of any article, or for the hire of any labour or services, or in respect of any arrangement with any other Company for the exercise of the powers and privileges of the said Company, or of any such other Company, or otherwise, in any of the matters incidental to the carrying on the affairs of the said Company, may be entered into on behalf of the Company by the directors; but such contracts shall be signed by at least three individual directors, or shall be sealed with the seal of the Company under the authority of a special meeting, or a resolution of the directors." There were other provisions as to bills and notes, and contracts for the purchases of lands; and this stipulation: "All contracts, whether under seal or not, including bills and notes, shall be immediately reported to the secretary:" There was no express provision that contracts should not be binding unless made in this stipulated manner. [*343

The case set out an agreement, dated the 14th September, 1853, between the plaintiff and the Company, by which the plaintiff, who had been in business on the Continent as a collector and transmitter of messages, agreed for a year, and from thence or so long as the parties pleased, to send all messages through the Company's telegraph, except where the sender of the message had specially directed it should be sent in some other way. The Company agreed to allow him seven per cent. on the amount they should receive; and the plaintiff bound himself not to enter into any contract with any other telegraph Company during the continuance of this agreement. This instrument was under *the seal of the Company. The supplemental case stated that, after the making of this deed, and whilst the same was in force, the chairman of the Company, "as such chairman, then being the officer of the said Company, and professing to act on behalf of the said Company, made a parol agreement with the plaintiff, by which the said chairman agreed, on the representation of the plaintiff that he was about to establish a new class of business, that plaintiff should be allowed 50 per cent. on all messages sent or received by him through the Com- [*344

pany's lines containing public intelligence; and that the chairman did, shortly after, and before anything was done under such agreement, with his own hand, write down the terms of such agreement in the minute book of The International Telegraph Company, a copy of which minute is as follows.

12th January, 1854. That during pleasure 50 per cent. be returned to Mr. Reuter on all messages transmitted by him containing public intelligence.

The said chairman did not sign the said minute; nor did any of the directors or secretary sign the same." The case also set out a previous correspondence, comprising, amongst other documents, the prospectus of the plaintiff's new undertaking; by which it appeared that he proposed that, in addition to his existing business of collector and transmitter of messages for persons who desired to send them, the plaintiff was to become collector of public, political, and commercial news, which he proposed to transmit to this country and communicate to subscribers. The following letter was sent by the plaintiff to the secretary of the Company. "London, 31st December, 1853. Dear Sir. By the enclosed circular you will observe that my new undertaking will *commence on 1st January, 1854; and, as, according to an arrangement with your chairman, 50 per cent. will be returned to me of all charges of despatches which I receive or send through your lines, I beg to ask which way you desire our accounts to be kept: if I am to pay you the whole amount for the messages: or whether I am only to pay you half of the usual charge each time. Awaiting your early reply." A letter of 14th January addressed to the plaintiff, in answer to this letter and others, contained the following passage: "As regards your proposition, the Company prefer, as a matter of convenience, that you should pay in the whole charge for a message, and receive back your percentage subsequently." This letter was signed "H. R. Wilson, pro. Secretary," the secretary himself being then absent. After this, accounts were from time to time sent in on this principle, in which the Company were charged with 50 per cent. on such messages; and these accounts were paid, and the amounts passed into the Company's books, which were audited. The Court had by the supplemental case power to draw inferences of fact. In the award the arbitrator found that "the services rendered by the plaintiff under the said parol agreement were calculated to be beneficial to the interests of the said Company in their business, but were not absolutely necessary. I find also that the terms of such agreement were never written but as above stated, and were never affirmed by having affixed to them the seal of the Company." And the only question he referred to the Court was, if the agreement was binding upon the Company.

*345]

The case was now argued.(*a*)

(*a*) Before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.

Hugh Hill, for the plaintiff.—The defendants, being a corporation for trading purposes, may be bound by an agreement not under seal, made in furtherance of the purposes of their incorporation; Henderson *v.* Australian Royal Mail Steam Navigation Company, 5 E. & B. 409 (E. C. L. R. vol. 85). [Lord CAMPBELL, C. J.—I was not a party to that judgment; but I highly approved of it. The decision in it must at all events be binding on us; it is therefore incumbent on the counsel for the defendants to distinguish the present case from that.] [*346

The Court then called on

Sir *Fitzroy Kelly*, for the defendants.—Though a trading corporation may be bound by a parol contract, it must be made by some one having authority to contract for the corporation. It is to be borne in mind that the shareholders are a fluctuating body: and the question is whether all of the present shareholders are bound. They are, if the contract was made by those authorized to contract: but here the authority is limited by the deed of settlement to contracts signed by three directors. Neither the chairman nor the secretary is intrusted with authority to make contracts for the corporation. [ERLE, J.—A trading corporation like the present holds a position intermediate between a municipal corporation and an ordinary copartnership. Do you go so far as to say that, if every existing shareholder personally knew of and assented to the contract, it still would not bind the corporation?] Such a contract would bind the individuals; but it probably would not bind the corporation, consisting of persons who might *afterwards acquire shares in ignorance of the contract, unless the formalities prescribed by the constitution of the Company had been complied with. But that question does not arise here; for it cannot be assumed that all the shareholders were cognisant of this transaction. [Lord CAMPBELL, C. J.—But there is ample evidence that the directors, who were trusted by the shareholders to conduct the business of the Company, knew of and recognised the contract; and that is evidence both of ratification on their part, and also of previous authority given by them.(*a*)] The contract is altogether ultra vires of the directors; it is not a part of the business of the Company to collect political news; and the plaintiff was already bound to transmit all his messages by the Company. Besides, the effect of the agreement is to give the plaintiff fifty per cent. advantage over his competitors, and so to frustrate the provision in the charter providing for equal charges. [*347

Hugh Hill was heard in reply. *Cur. adv. vult.*

Lord CAMPBELL, C. J., on a subsequent day (May 8), delivered judgment.

We are of opinion that the plaintiff is entitled to our judgment.

No reliance can be placed upon the objection that the defendants are

(*a*) See Smith *v.* The Hull Glass Company, 11 Com. B. 897 (E. C. L. R. vol. 73).

a corporation, and that the agreement on which they are sued is not under seal. They are a corporation for carrying on a particular business; and the services done by the plaintiff were in the direct course of the business which by their charter they were *to carry on. We adhere to the decision of this Court in Copper Miners' Company *v.* Fox, 16 Q. B. 229, 236 (E. C. L. R. vol. 71), and Henderson *v.* Australian Royal Mail Steam Navigation Company, 5 E. & B. 409 (E. C. L. R. vol. 85).

*348]

The next objection is that, at all events, according to the deed of settlement, the contract ought to have been "signed by at least three individual directors." We do not think it necessary to decide whether the consideration-money here must be taken to exceed 50*l.*; for, assuming that the contract was originally ultra vires of the chairman, we think that it has been adopted and ratified by the Company, so as to render them liable upon it. We must first observe that this contract, which was entered into on the 12th of January, 1854, does not appear to us to be at variance or at all inconsistent with the prior agreement of 14th September, 1853. The new business of collecting public intelligence by the plaintiff's personal exertions, and transmitting it by the telegraph, had not been before contemplated; and the remuneration for it was provided for on a totally different footing. Might not the contract entered into by the chairman, although originally without authority, and not binding, be ratified by the Company? The deed of settlement declares that "the directors shall conduct and manage the affairs of the Company, and shall exercise all the powers which may be exercised by the Company at large." Then the documents set out in the supplemental case afford abundant evidence that the directors were made acquainted with the new contract, approved of it, and acted upon it. The entry of it in the minute book by the chairman was for their information; and we, having power to draw inferences from the evidence, do infer that they saw it and sanctioned it. The plaintiff *acted under it for many months; during this period he corresponded respecting it with the secretary, the proper functionary of the Company for carrying on such correspondence; he, from time to time, rendered accounts to the Company, taking credit for business done under the agreement; and payments were made to him of sums for which he so took credit by checks which the directors must have drawn. We are bound to suppose that the directors, before they drew the checks, examined the accounts and approved of what the plaintiff had done. It is found by the arbitrator, indeed, that, although he was to recover a larger remuneration under the new agreement than under the old, the services to be done by the plaintiff under the new agreement were calculated to be beneficial to the interests of the Company. The accounts show that he thus brought custom to the Company, and

*349]

that they profited by the services which they must be considered as requesting him to continue.

We have only further to dispose of Sir *Fitzroy Kelly's* last objection, founded upon the proviso in the charter, that the telegraphs of the Company "shall be open for the sending and receiving of messages by all persons alike, without favour or preference, subject to such equitable charges and to such reasonable regulations as may from time to time be made by the said Company." It is urged that this agreement gives a preference to the plaintiff by allowing him to send his messages at half price. Grave doubts may be entertained whether this proviso, although it may be made the foundation of complaints against the Company, can be rendered available to them in resisting a demand under a contract into which they have entered. But the allowance to *the plaintiff seems rather a remuneration to him for his services [*350 in collecting public intelligence and bringing custom to the Company than any preference or partiality to him in the use of the telegraph; and there is nothing to show that their dealings with him, which they now contend to be illegal, are not according to "equitable charges" and "reasonable regulations."

For these reasons we think that the defendants are liable for the additional sum of 217*l.* under the new agreement, and give judgment for the plaintiff. Judgment for the plaintiff.

SAMUEL JEWEL and GABRIEL SCOTT *v.* WILLIAM STEAD.
May 2.

By a turnpike Act, the trustees were authorized to erect toll bars, but not within three miles of B.

Held, that the distance from B. must be measured on the straight line on the horizontal plane; the circumstance that the Act was a turnpike Act not being sufficient to indicate an intention that it should be measured along the road.

THIS was a case stated without pleadings. The defendant was clerk to the trustees of the Whiteparish, Romsey, and Southampton turnpike roads. The plaintiffs brought the action to recover back tolls which had been taken from them at a toll-gate called the Maybush gate, on one of those roads. The question was, whether the trustees were entitled to levy tolls there.

The case in substance stated that the Whiteparish, Romsey, and Southampton turnpike roads were made under stat. 5 Geo. 4, c. lxxxiii.(*a*)

(*a*) Local and personal, public: "For amending the roads leading from Brickworth Pond, in the parish of Whiteparish in the county of Wilts, through Romsey in the county of Southampton, to the county of the town of Southampton."

*351] *In this Act were contained clauses authorizing the erecting of toll bars, and the levying of tolls by the trustees. Sect. 15 was as follows: "That nothing herein contained shall extend, or be construed to extend to empower the said trustees to erect any turnpike, toll-gate, or bar, or take or levy, or cause to be taken or levied any toll whatever, within three miles of Bar Gate, in the said town and county of Southampton." Bar Gate is in Southampton, on a road forming part of the Southampton roads, erected under stat. 4 Geo. 4, c. xv.(a)

Attached to the case was a map, by which it appeared that the road from Romsey to Southampton, which was one of the turnpike roads formed under stat. 5 G. 4, c. lxxxiii., runs nearly in a straight line in a south-east direction to a spot called Acorn Bridge, which is at the outskirts of the town of Southampton, and on the north-west side of Southampton Water. Bar Gate is on the south-east side of Southampton Water, so that the straight line from Acorn Bridge to Bar Gate goes across the bay. The Whiteparish, Romsey, and Southampton roads terminate at Acorn Bridge; from thence the practicable passage to Bar Gate is either by following the Southampton roads round the head of Southampton Water, or by the shore road across the beach of Southampton Water. The latter passage at present is passable at all times; but it has only been made so since 1848. Before that time it was flooded

*352] by the tides, so as to be impassable for *passengers at spring tides, and was not generally used for vehicles at all. The Southampton roads existed before stat. 5 G. 4, c. lxxxiii. The Maybush toll-gate was erected on the road to Romsey beyond Acorn Bridge; and there the plaintiffs paid tolls under protest. The gate is less than three miles from Bar Gate, measuring the distance in a straight line on the horizontal plane: it is also less than three miles, following the turnpike road to Acorn Bridge, and then following the shore road; but it is more than three miles following the turnpike road the whole way.

The question for the opinion of the Court was: Whether the three miles, mentioned in the provision of the said Act first hereinbefore referred to, should be measured in either of the modes firstly and secondly above mentioned, or in the mode lastly above suggested.

If the Court shall be of opinion that the said three miles should be measured in either of the modes firstly and secondly above suggested, then judgment is to be entered for the plaintiffs for the amount of the tolls demanded of and taken from them as aforesaid.

If the Court shall be of opinion that the said three miles should be

(a) Local and personal, public: "For repairing and improving the roads from the town of Stockbridge to the city of Winchester, and from the said city of Winchester to the top of Stephen's Castle Down, near the town of Bishop's Waltham in the county of Southampton, and from the said city of Winchester through Otterborne to Bar Gate, in the town and county of the town of Southampton, and certain roads adjoining thereto."

measured in the mode lastly above suggested, then judgment is to be entered for the defendant.

Lomer, for the plaintiffs.—If the words of stat. 5 G. 4, c. lxxxiii., s. 15, are ambiguous, they ought to be construed in favour of the public, and against the promoters of the Act, whose words they must be taken to be. But the words are not ambiguous; for, "within three miles of Bar Gate" means within three miles measured on a straight line on the horizontal plane; *Lake *v.* Butler, 5 E. & B. 92 (E. C. L. R. vol. 85). Even if this were not the rule, the distance must be by the shortest road, that is, the shore road. [*353

J. D. Coleridge, contrà.—In Lake *v.* Butler the rule was laid down that the distance between two places, in an Act of Parliament, was to be understood to mean the distance in the straight line, unless there was something to indicate a contrary intention. In the present case the Act is a turnpike Act; and it provides that no gate shall be erected within three miles of a gate on another turnpike trust: the object must have been to protect that other trust; and this sufficiently indicates that the distance is to be measured in the way taken by toll-paying vehicles; that is, along the road. The distance would be ascertained at once by the milestones, which, by the general turnpike Act, 3 G. 4, c. 126, s. 119, must be along the road. It is true that now there is another road: but at the time of the passing of stat. 5 G. 4, c. lxxxiii., it was not practicable. That Act, by implication, directs that the distance should be measured along the then existing turnpike road.

Lord CAMPBELL, C. J.—It is not necessary to consider whether the second or third mode of measurement suggested is preferable; for I am of opinion that the mode of measurement in this case is along the straight line on the horizontal plane. In Lake *v.* Butler this Court held that such was in general to be considered the mode of measurement. I think it is very inexpedient *to act upon nice distinctions, thereby encouraging litigation; and that, unless there appear in the Act a clear indication that there was a contrary intention, this mode of measurement should be adopted. There is no such clear indication here. It is true that this is a turnpike Act: but there is nothing, either in this Act or in the General Turnpike Act, to indicate that the distance from Bar Gate is to be measured in any particular manner. The turnpike road ends before it comes to Bar Gate; and altogether there is nothing to indicate that the distance of three miles from Bar Gate is not to be measured as in Lake *v.* Butler. [*354

WIGHTMAN, J., concurred.

ERLE, J.—I also think that the general rule should be abided by. The special facts of this case show that it is expedient that such should be the mode of measurement.

CROMPTON, J.—In Lake *v.* Butler it was suggested that, if the nearest

practicable road were the mode of measuring the distance, there might be places the distance between which would vary according to the state of the tide. In this case that very point would arise if we did not adhere to the general rule laid down in Lake *v.* Butler. It is a case showing the expediency of that rule. Judgment for the plaintiffs.

*355] *IN THE EXCHEQUER CHAMBER.

(Error from the Court of Queen's Bench.)

WESTERN WOOD *v.* WILLIAM BELL, JAMES RHODES, and FREDERIC MOSER. *May* 2.

J., a shipbuilder, agreed to build an iron steamship for plaintiff on the same terms as other vessels which he had previously built for him. By reference to these terms it appeared that the price was to be 16,000*l.*, payable by instalments, the first instalment to be 1000*l.* payable immediately. The second, third, and fourth, of 1000*l.* each, to be payable at the end of two, three, and four months respectively from the date of the order; the remaining 12,000*l.* to be payable by instalments of 3000*l.* each, the first 3000*l.* at the end of six months, provided the vessel was plated and decks laid; the second 3000*l.* at the end of eight months, provided the vessel was ready for trial; the third 3000*l.* at the end of eleven months, provided the vessel was according to contract and perfectly completed; the last instalment of 3000*l.* at the end of thirteen months; the vessel to be built under the superintendence of H., appointed for that purpose by plaintiff, and according to his specifications.

The building commenced under the superintendence of H. Plaintiff advanced money to J. in anticipation of the instalments. In the 10th month J. became bankrupt: the vessel was at that time unfinished in J.'s yard; and engines and parts of the frame work of the vessel, adapted for the unfinished ship, but not yet fixed into her frame work, were there also. Plaintiff claimed the unfinished vessel and these engines and parts of the frame work. The assignees of J. kept them as part of the estate of J. The amount paid in advance by plaintiff exceeded the value of this property.

In an action by plaintiff against the assignees, a case was stated for the opinion of this Court, giving power to draw inferences of fact, and setting forth the above facts, and also that the unfinished ship was known at J.'s yard as plaintiff's ship, and that H. had, with J.'s consent, before the bankruptcy, stamped plaintiff's name on the keel of the vessel, for the express purpose of indicating that she was the property of plaintiff. The questions were, whether the property belonged to plaintiff or the assignees. And whether plaintiff could recover special damages for the detention of the ship, beyond its value.

The Court of Queen's Bench decided that the plaintiff was entitled to recover in respect both of the ship and of the loose engines and materials; and that he was also entitled to recover special damages.

On Error to the Court of Exchequer Chamber, that Court concurred with the Court of Queen's Bench as to the ship, but held that the plaintiff was not entitled to recover in respect of the loose engines and materials, and that the damages were to be assessed in respect of the ship only.

A SPECIAL case was stated for the opinion of the Court of Queen's Bench.

There were no pleadings, but only a writ issued on 27th March, 1855.

*356] The plaintiff claimed to recover *The Britannia vessel and the several descriptions of property hereinafter mentioned, or their value, and damages for their detention.

From the case stated, it appeared that William Joyce, a shipbuilder,

agreed to build an iron steamship for the plaintiff, on the same terms as other vessels which he had previously built for him. By reference to these terms it appeared that the price was to be 16,000*l.*, payable by instalments, the first instalment to be 1000*l.* payable immediately; the second, third, and fourth, of 1000*l.* each, to be payable at the end of two, three, and four months respectively from the date of the order; the remaining 12,000*l.* to be payable by instalments of 3000*l.* each, the first 3000*l.* at the end of six months, provided the vessel was plated and decks laid; the second 3000*l.* at the end of eight months, provided the vessel was ready for trial; the third 3000*l.* at the end of eleven months, providing the vessel was according to contract and perfectly completed; the last instalment of 3000*l.* at the end of thirteen months; the vessel to be built under the superintendence of John Hall (appointed for that purpose by plaintiff), and according to his specifications.

The building commenced under the superintendence of Hall. Plaintiff advanced money to Joyce in anticipation of the instalments. In the tenth month Joyce become bankrupt: the vessel was at that time unfinished in Joyce's yard; and engines and parts of the frame work of the vessel, adapted for the unfinished ship, but not yet fixed into her frame work, were there also. Plaintiff claimed the unfinished vessel and these engines and parts of the frame work. Defendants, who were assignees of Joyce, kept them as part of the estate of Joyce. *The amount paid in advance by plaintiff exceeded the value of this property. [*357

In an action by plaintiff against the assignees, a case was stated for the opinion of the Court of Queen's Bench, giving the Court power to draw inferences of fact, and setting forth the above facts, and also that the unfinished ship was known at Joyce's yard as plaintiff's ship, and that Hall had, with Joyce's consent, before the bankruptcy, stamped plaintiff's name on the keel of the vessel, for the express purpose of indicating that she was the property of plaintiff. The questions were, whether the property belonged to plaintiff or the assignees. And whether plaintiff could recover special damages for the detention of the ship, beyond its value.

The Court of Queen's Bench decided that the plaintiff was entitled to recover in respect both of the ship and of the loose engines and materials; and that he was also entitled to recover special damages; Wood *v.* Bell, 5 E. & B. 772 (E. C. L. R. vol. 85).(*a*)

Judgment was entered in the Court of Queen's Bench that the plaintiff do recover against the defendants "the said ship Britannia, the said parts of engines, the said iron plates and angle irons, and the said planking and timbers, and also 2200*l.*, the special damages by the said Western Wood sustained, and ascertained by the said," &c. (an arbitrator), "and also," &c. (costs).

(*a*) Where the case is more fully set out.

The defendants suggested error on this judgment, in the Court of Exchequer Chamber; which the plaintiff denied.

The case was now argued.

Shee, Serjt., for the party suggesting error (the defendants below).

*358] *First: as to the ship. The defendants do not dispute the principles laid down in the Court below; but they deny the applicability to the particular facts of this case. The general rule is that the property in an article made to order does not pass till the article is complete; but it may pass before, if the parties agree that it shall. The question is, whether this case is within the general rule or the exception. The general rule prevailed in Mucklow *v.* Mangles, 1 Taunt. 318, though there the name of the intended purchaser had, as here, been put on the ship: and Abbott, C. J., in Woods *v.* Russell, 5 B. & Ald. 942 (E. C. L. R. vol. 7), considered that circumstance immaterial; and he decided Woods *v.* Russell on grounds not existing here. The ship there was chartered by the purchaser; and the builder was a party to the registration in the name of the purchaser. The case, as is said in the judgment, did not depend on the payment of the instalments. And in the 5th edition of Abbott on Shipping (the last published in the author's lifetime), p. 44, the decision is not put on that footing. Clarke *v.* Spence, 4 A. & E. 448 (E. C. L. R. vol. 31), was decided mainly on the authority of Woods *v.* Russell, though the only circumstance common to the two cases seems to have been the payment of instalments, and the appointment by the purchasers of a person to superintend the work. In Laidler *v.* Burlinson, 2 M. & W. 602,† the Court of Exchequer decided that the property did not pass, under the particular circumstances of that case; and the decision, perhaps, does not go far towards determining the present case. But it cannot be collected from the facts here that any intention existed of passing the property in the vessel while in an incomplete state. The word "intention" is

*359] *always liable to ambiguity: the safe course is to rely only on an intention executed; Ellershaw *v.* Magniac, 6 Exch. 570 (note).†

Supposing the ship itself to have passed, the next question is as to the materials which had not been affixed to the ship. All that appears is that the builder intended to use them for the ship: he did not in fact so use them: nor, if they were not approved of, could he have done so. In Woods *v.* Russell, the rudder and cordage seem to have been bought for the ship with the intention of making them a part, eo instanti. In Baker *v.* Gray, 17 Com. B. 462 (E. C. L. R. vol. 84), the builder agreed with the intended purchaser that, if the builder failed to complete the ship according to the agreement, the purchaser might use such of the builder's materials as should be applicable to the purpose. The builder not having completed the ship according to contract, the purchaser took possession of the incomplete ship, and also selected some of the builder's

materials, a part of which he placed in the carcass of the ship; but, before he had used any, the builder became bankrupt: and it was held that the assignees were entitled to the materials; Tripp *v.* Armitage, 4 M. & W. 687,† is to the same effect. [JERVIS, C. J., referred to Goss *v.* Quinton, 3 M. & G. 825 (E. C. L. R. vol. 42).]

As to the question of special damage. The damage sustained by the plaintiff is the value of the ship at the time of the conversion; Reid *v.* Fairbanks, 13 Com. B. 692 (E. C. L. R. vol. 76). It is not necessary to dispute the authority of cases in which special damage is stated and proved; such as Davis *v.* Oswell, 7 Car. & P. 804 (E. C. L. R. vol. 32), and Bodley *v.* Reynolds, 8 Q. B. 779 (E. C. L. R. vol. 55). Here, there *being no pleadings, no special damages can be understood to be claimed; and they cannot be recovered unless claimed; Moon *v.* Raphael, 2 New Ca. 310 (E. C. L. R. vol. 29). Nor, according to general principles, can the loss of part of contingent and remote profits form part of the damages recoverable. In Sedgwick On The Measure of Damages, p. 78 (ch. 3), it said, after referring to Flureau *v.* Thornhill, 2 W. Bl. 1078: "Both the English and American Courts have generally adhered to this denial of profits as any part of the damages to be compensated, and that whether in cases of contract or of tort." [*360

Bovill, contrà (for the plaintiff below).—First: the plaintiff was entitled to recover in respect of the body of the ship. (On this point he was stopped by the Court.)

As to the materials which were not fixed. In Woods *v.* Russell, 5 B. & Ald. 942 (E. C. L. R. vol. 7), the cordage and rudder were not fixed. [BRAMWELL, B.—If you defend the judgment below, as to the body of the ship, on the principle which seems there adopted, of an intention executed and irrevocable, you will find it difficult to apply that to the materials which were not fixed.] The goods were irrevocably appropriated as soon as one party had selected them for the purpose, and the act of selection had been adopted by the other party; Blackburn On the Effect of the Contract of Sale, 126, 129; Joyce could not have sold these materials to a third party. [BRAMWELL, B.—Suppose the builder had a forest of timber, and marked certain growing trees.] Those would not be chattels at all. [ALDERSON, B.—Suppose a bulk of timber, and half of it to have been actually used in the building of the ship, the builder intending to use the rest in the same way.] *All would probably be held to pass. [CRESSWELL, J.—One contract only is set up.] There is a fresh contract at the time of each assent. [CRESSWELL, J.—At what price?] At the price actually paid. [CRESSWELL, J.—That will apply to the ship only.] The inventory furnishes evidence of the conduct of the parties from which the same inference arises as in the case of the ship. [*361

As to the special damage. The objection to the absence of allega-

tion does not arise, there having been no record at all. The question is, whether the facts show such damage. And it is plain that the plaintiff, if he had received the ship at the time when he was entitled to it by the contract, might have earned a considerable sum by employing it. [Jervis, C. J.—Certainly, in an action for non-delivery of a plank, you would not be confined to the value which it might bear at the time of the verdict: it might have rotted in the mean while.] The plaintiff is to recover all he has lost by the conversion.

Jervis, C. J.—I think this case should go back to the arbitrator. In substance, the judgment below is reversed. I agree with the Court below that the ship passed. That question is merely one of fact; as well put in Mr. Blackburn's useful work,(*a*) the property does not pass merely by its being manufactured, but only when it is the intention of the parties that it shall pass. And here I think the facts show such an intention. I further concur with the details of the judgment below, so far as the ship is concerned. But I do not think that, as the Court below seems to have held without much *consideration, the unfixed materials destined for the ship did pass. They do not appear to have been circumstanced exactly as the rudder and cordage were in Woods *v.* Russell, 5 B. & Ald. 942 (E. C. L. R. vol. 7), where they had become, it seems, a part of the ship. Here they are merely provided for the ship. If the circumstances in Woods *v.* Russell were the same as here, I should doubt whether the decision in that case was right: and I should say the same as to Goss *v.* Quinton, 3 M. & G. 825 (E. C. L. R. vol. 42). The question is, What is the ship? not, What is meant for the ship? I think those things pass which have been fitted to the ship, and have once formed part of her, as, for instance, a door hung upon hinges, although afterwards removed for convenience. I do not think the circumstance that materials have been fitted and intended for the ship makes them part of the ship. The consequence is that the arbitrator has assessed the damages at 2200*l.* on an assumption which we consider wrong, as he will have included many items in respect of which the plaintiff is not entitled to damages. The case may as well stand over for a few days; and in the mean while a schedule may be made out showing what each party claims.

*362]

Pollock, C. B., Alderson, B., Cresswell, J., Crowder, J., Willes, J., and Bramwell, B., concurred.

In the following Trinity Term (June 2d, 1856), before Jervis, C. J., Pollock, C. B., Cresswell, Williams, Crowder, and Willes, Js., and Martin and Bramwell, Bs., the case was resumed; *Shee*, Serjt., appearing for the defendants below, and *Bovill* for the plaintiff below; *when a discussion took place as to the principle upon which the damages were to be assessed.

*363]

The Court said that, the judgment being wrong as to a part, and the

(*a*) On the Effect of the Contract of Sale, Part II. ch. 2.

damages being entire, the regular course was to order a venire de novo: that consequently here the case ought to go back to the arbitrator: and, as the plaintiff was entitled to recover in respect of the ship, but not in respect of the unfixed materials, the arbitrator would assess the damages, if any, recoverable in respect of the ship only. But they declined giving any more specific directions as to the damages.

The QUEEN *v.* HENRY SPRATLEY and three Others.

At an election for councillors for M., voting papers were tendered signed A. B., "voting for property situate in the parish of C.;" they were rejected, and the rejection altered the majority. In an information in the nature of Quo warranto against the councillors returned, it was admitted on the record that the borough of M. consists of parts of two parishes, the parish of C. being one: that, though there are in M. streets and lanes, the description in the voting papers was such as to be commonly understood; and that the boundaries of the parish are well known and defined.

Held that the fault, if it was one, was cured as a misdescription under stat. 5 & 6 W. 4, c. 76, s. 142.

Per Coleridge, J. The voting paper was not a sufficient description within sect. 32. Per Lord Campbell, C. J., and Crompton, J., *semble* it was.

THIS was an information in the nature of Quo warranto. The information in one count charged four defendants with usurping the offices of councillors of the borough of Maidenhead. The plea stated, as their title, that an election for four councillors was duly held, and that the defendants, being qualified persons, were declared by the Mayor and Assessors to have the majority of votes.

Replication. That at the election there were four *other duly qualified candidates, naming them. That the Mayor and Assessors did not take into account certain voting papers delivered to them by burgesses duly entitled to vote, on the ground "that such voting papers did not disclose or state the name of the street, lane, or other place, in which the property, for which the said burgesses respectively so delivering such voting papers as aforesaid appeared to be rated on the burgess roll, was respectively situated: that each of the said voting papers were signed with the name of the voter; and such voting papers, which were not taken into account and computed as aforesaid, were, with the variation of the name of the voter, in the following form. [*364

'Municipal Corporation Reform Act. Borough of Maidenhead. Voting paper for councillors. I, the undersigned John Henry Micklem, being a burgess entitled to vote in the said election of councillors for the borough of Maidenhead in the county of Berks, do hereby vote for the several persons whose names are hereunder written to be councillors of the said borough. As witness my hand, this 1st day of November, 1855. JOHN HENRY MICKLEM. Voting for property situate in the parish of Cookham.

Names of Persons.	Place of Abode.	Descriptions.
William Nicholson	Maidenhead	Brewer
Caleb Colman	Maidenhead	Draper
Daniel Stone	Maidenhead	Draper
Robert Mills	Maidenhead	Grocer

That, although there were at the time of the said election divers streets, lanes, and other places named with different names in the said borough
*365] in which the *said properties mentioned in said voting papers respectively were respectively situate, the said description of the said properties respectively in the said voting papers so delivered as aforesaid were such as to be commonly understood: that the said borough consists entirely of portions of two several parishes, the boundaries of which are well known and defined. And that, because of the said Mayor and Assessors not taking into account and computing the said several voting papers so delivered to them as aforesaid on the ground of the said alleged informality," the majority of votes was declared for the defendants, whereas, if these votes had been received, the majority would have been against them. Demurrer. Joinder.

Macaulay, for the defendants.—Stat. 5 & 6 W. 4, c. 76, s. 32, provides that the election shall be by the burgess delivering in "a voting-paper, containing the Christian names and surname of the persons for whom he votes, with their respective places of abode and descriptions, such paper being previously signed with the name of the burgess voting, and with the name of the street, lane, or other place, in which the property for which he appears to be rated on the burgess roll is situated." It appears on the record that there are in Maidenhead streets and lanes with separate names, which are contained in two parishes: instead of giving the name of one of these streets or lanes, the voting-papers set out on the record give only the name of the parish of Cookham; and the contention must be that Cookham comes within the meaning of "other places" in sect. 32. But the "place" must be ejusdem generis with the words that went before, viz. "street" or
*366] "lane," and not a parish *which contains many streets. It will be contended that this is a misdescription of a place named in a voting paper, and, consequently, that the averment in the replication, that the description of the properties was such as to be commonly understood, brings the case within the curing operation of sect. 142. But this is not a misdescription of a place, but a total omission to describe it at all. If in a voting paper for Westminster (supposing it to be incorporated) Devonshire House were named as the property, it would be perfectly understood; but sect. 32 would not be satisfied unless Piccadilly were added; and it would not be possible to contend that Parish of St. James would be a misdescription of Piccadilly within sect. 142. In Regina *v.* Hammond, 17 Q. B. 772 (E. C. L. R. vol. 79), the candidate was described by his place of business, by which he was

better known than by his place of abode; yet it was held not to be equivalent. In the present case there is an additional reason for requiring the street to be named, as that affords the means of identifying the voter with the entry on the burgess roll, which must be in the form given in Schedule (D.) No. 1, to stat. 5 & 6 W. 4, c. 76.

Bovill, contrà.—It may be that the description in the voting papers is a literal transcript of that in the burgess roll; at all events it must afford the means of identifying the property, or the averment in the replication would not be true. The parish may be a much more definite description than the street; there are, both in the city of London and in Norwich, many very small parishes not nearly so extensive as some streets. A *similar objection was made to a notice under stat. 6 & 7 Vict. c. 18, s. 17, and failed; Wills *v.* Adey, 2 Com. B. 246 (E. C. L. R. vol. 52). It is, at all events, not a worse inaccuracy than those which were held to be cured, by sect. 142, in Regina *v.* Gregory, 1 E. & B. 600 (E. C. L. R. vol. 72), and Regina *v.* Thwaites, 1 E. & B. 704. [*367

Macaulay, in reply.—Wills *v.* Adey, 2 Com. B. 246 (E. C. L. R. vol. 52), was not under the same statute. Regina *v.* Gregory, 1 E. & B. 600 (E. C. L. R. vol. 72), and Regina *v.* Thwaites, 1 E. & B. 704, were inaccurate descriptions; here there is an absence of any description of a street, lane, or other similar place.

Lord CAMPBELL, C. J.—I am of opinion that the voting papers set out in the replication are sufficient. We ought to put on doubtful expressions in this Act of Parliament a construction which will meet the object of the Legislature, and enable persons who have substantially complied with its directions to enjoy their franchise. We may, I think, hold these voting papers sufficient, even without calling in aid the provision in sect. 142 to cure mistakes. For all that sect. 32 requires is that the voting paper shall contain "the name of the street, lane, or other place, in which the property for which he appears to be rated on the burgess roll is situated." Now, though I think that the "other place" must be ejusdem generis with "street" and "lane," I think that a parish may, in some cases, be ejusdem generis with street or lane. If the parish or the part of it within the borough be small, it may designate the property situated within it as effectually as the mention of the street could do. The object of the Act in requiring a description was *that the property might be identified, in order that by means of it the voter might be identified. The inclination of my opinion is that, if the parish be so small that it would be as effectual as a guide to the property as a street or lane, it would be a place ejusdem generis. But, if not sufficient under sect. 32, I think it clear that the fault is exactly what the Legislature meant to cure by sect. 142. It is an inaccurate description of a place; for a description that is too general is an inaccurate description: and, if an inaccurate description is such as [*368

to be commonly understood, it is by sect. 142 sufficient. It is averred in the replication and admitted by the demurrer that this description is such as to be commonly understood. Then, if not sufficient under sect. 32, because too general a description of a place, it is inaccurate, and cured under sect. 142. The decision in Regina *v.* Hammond was that an enactment requiring the description of the place of abode was not satisfied by a description of the place of business, a decision which has no bearing on the present case.

COLERIDGE, J.—I think there must be judgment for the relator, not because sect. 32 has been complied with, which I think it has not, but because sect. 142 cures the defect. It is of importance to adhere to general rules in construing statutes. I think, on reading sect. 32, the proper construction to be put on the words "other place," coming as they do next to "street, lane," is that it must be a place of the same kind, that is something not of the nature of city, borough, parish, or any such place which may include many streets and lanes *and smaller places: and I think this construction is fortified by referring to the form of the burgess roll in Schedule (D.). I therefore think that a place, to satisfy sect. 32, must be such a place as is a portion of one of these greater wholes. But, admitting that in this parish there are streets and lanes in one of which the property is, the replication avers that the description is such as to be commonly understood. That is admitted by the demurrer: and how can I say that the naming of "the parish of Cookham" might not be commonly understood to indicate the street in which the property is?

*369]

CROMPTON, J.—I am not satisfied that this is not sufficient within sect. 32. The argument to the contrary mainly depends on bringing in the description in schedule (D.); but I am by no means sure that the intention of the Legislature was to require the insertion of a place smaller than a parish. The description in the voting paper need not be the same as that in the burgess roll: and I think that a place small enough to be fairly sufficient to identify the property would be enough, and that a parish might be such a place. But, assuming it to be insufficient, it is only a very narrow spelling of the words of sect. 142 that could prevent it from being within it. But sect. 142, being a remedial enactment, should be construed liberally. It seems to me that it would be strange if misdescription (though likely enough to mislead) were cured, and looseness of description were not. But this is clearly included in "inaccurate description."

Judgment for the Crown.(*a*)

(*a*) No fourth Judge was present.

*JOHN PYM *v.* ROBERT JAMES ROY CAMPBELL, JAMES THOMPSON MACKENZIE and RICHARD PASTOR PRITCHARD. *May* 3.

[*370

Action on an agreement for sale. Plea, Non assumpsit. On the trial plaintiff produced an agreement signed by defendant. Defendant gave evidence that plaintiff and defendant, having negotiated as to the purchase, agreed on the terms, and it was arranged that they and a third person, A., should meet, when, if A. approved of the property, they would make a bargain on these terms. At the meeting plaintiff did not attend till A. had gone. It was then arranged that plaintiff and defendant should draw up and sign a memorandum of an agreement of sale, but that it should not be a bargain until A., on being consulted, approved. A. did not approve. The Judge directed the jury to find for defendant if satisfied that it was arranged that the writing should be no agreement until A. approved.

Held, a right direction.

First count. That defendants agreed to purchase of the plaintiff, for 800*l.*, three-eighth parts of the benefits to accrue from an invention of plaintiff's. General averments of readiness to convey, and tender of a conveyance of the three-eighths. Breach: that defendants refused to accept them. Counts for shares in inventions bargained and sold, and on accounts stated. Pleas. 1st, to first count: That defendants did not agree. 9th, to the other counts: Never indebted. It is not necessary to notice the other seven pleas.

On the trial, before Lord Campbell, C. J., at the sittings at Guildhall after last Hilary term, the plaintiff was called as a witness. He produced and gave in evidence a paper of which the following is a copy.

"500*l.* for a quarter share. 300*l.* for one-eighth, and 50*l.* to be paid to Mr. Sadler. No other shares to be sold without mutual consent for three months. London, 17th January, 1854.

One-eighth. R. J. R. Campbell.
John Pym.
One-eighth. J. T. Mackenzie.
One-eighth. R. P. Pritchard.

*With reference to the above agreement and in consideration of the sum of five pounds paid me I engage, within two days from this date, to execute the legal documents, to the satisfaction of your solicitors, to complete your title to the respective interests against your names in my Crushing, Washing, and Amalgamating Machine.

[*371

London. 17 January, 1854. John Pym."

He gave evidence that he was inventor of a machine which he wished to sell through the instrumentality of one Sadler, who had introduced the defendants to him; that, after some negotiations, the defendant Campbell drew out the above paper, which both plaintiff and defendants then signed, and which plaintiff took away.

The defendants gave evidence that, in the course of the negotiations with the plaintiff, they had got so far as to agree on the price at which the invention should be purchased if bought at all, and had appointed

a meeting at which the plaintiff was to explain his invention to two engineers appointed by the defendants, when, if they approved, the machine should be bought. At the appointed time the defendants and two engineers of the names of Fergusson and Abernethie attended; but the plaintiff did not come; and the engineers went away. Shortly after they were gone the plaintiff arrived. Fergusson was found and expressed a favourable opinion; but Abernethie could not then be found. It was then proposed that, as the parties were all present, and might find it troublesome to meet again, an agreement should be then drawn up and signed, which, if Abernethie approved of the invention, should be the agreement, but, if Abernethie did not approve, should not be one. Abernethie did not approve of the invention when he saw it; and the defendants contended that there was no bargain.

*372] *The Lord Chief Justice told the jury that, if they were satisfied that, before the paper was signed, it was agreed amongst them all that it should not operate as an agreement until Abernethie approved of the invention, they should find for the defendants on the pleas denying the agreement. Verdict for the defendants.

Thomas, Serjt., in the ensuing term, obtained a rule nisi for a new trial on the ground of misdirection.

Watson and *Manisty* now (*a*) showed cause.—The direction was correct. When parties have signed an instrument in writing as the record of their contract, it is not competent to them to show by evidence that the contract really was something different from that contained in the writing; and therefore in this case, if the defendants had signed this as an agreement, they could not have shown that the agreement was subject to a condition. But they may show that the writing was signed on the terms that it should be merely void till a condition was fulfilled; for that shows there never was a contract; Davis *v.* Jones, 17 Com. B. 625 (E. C. L. R. vol. 84). So, where the holder of a bill writes his name on it and hands it over, that is no endorsement if it was done on the terms that it should not operate as an endorsement till a condition is fulfilled; Bell *v.* Lord Ingestre, 12 Q. B. 317 (E. C. L. R. vol. 64), Marston *v.* Allen, 8 M. & W. 494.†(*b*) It is true that a deed cannot be delivered as an escrow to the party:(*c*) but that is for purely technical reasons, inapplicable to parol contracts.

*373] **Thomas*, Serjt., and *J. H. Hodgson*, contrà.—The very object of reducing a contract to writing and signing it is to prevent all disputes as to the terms of the contract. Here the attempt is to show by parol that the agreement to take this invention was subject to a condition that Abernethie approved; while the writing is silent as to that.

(*a*) Before Lord Campbell, C. J., Erle and Crompton, Js. The argument was completed, and judgment given, on May 5, before the same Judges and Wightman, J.

(*b*) See Lloyd *v.* Howard, 15 Q. B. 995 (E C. L. R. vol. 69); Barber *v.* Richards, 6 Exch. 63.†

(*c*) Co. Litt. 36 a.

Davis *v.* Jones proceeded on the ground that the instrument was imperfect; the cases as to bills of exchange proceed upon the necessity that there should be a delivery to make an endorsement.

ERLE, J.—I think that this rule ought to be discharged. The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional: and if that had been so it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it his his written agreement; and, if in fact he did sign the paper animo contrahendi, the terms contained in it are conclusive, and cannot be varied by parol evidence: but in the present case the defence begins one step earlier: the parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion: but, if it be proved that in fact *the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The [*374 distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.

CROMPTON, J.—I also think that the point in this case was properly left to the jury. If the parties had come to an agreement, though subject to a condition not shown in the agreement, they could not show the condition, because the agreement on the face of the writing would have been absolute, and could not be varied: but the finding of the jury is that this paper was signed on the terms that it was to be an agreement if Abernethie approved of the invention, not otherwise. I know of no rule of law to estop parties from showing that a paper, purporting to be a signed agreement, was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid, or something else done. When the instrument is under seal it cannot be a deed until there is a delivery; and when there is a delivery that estops the parties to the deed; that is a technical reason why a deed cannot be delivered as an escrow to the other party. But parol contracts, whether by word of mouth or in writing, do not estop. There is no distinction between them, except that where there is a writing it is the record of the contract. The decision in Davis *v.* Jones is, I think, sound law, and proceeds on a just distinction: *the parties may not vary a written agreement; but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement; for [*375

they never had agreeing minds. Evidence to show that does not vary an agreement, and is admissible.

Lord CAMPBELL, C. J.—I agree. No addition to or variation from the terms of a written contract can be made by parol: but in this case the defence was that there never was any agreement entered into. Evidence to that effect was admissible; and the evidence given in this case was overwhelming. It was proved in the most satisfactory manner that before the paper was signed it was explained to the plaintiff that the defendants did not intend the paper to be an agreement till Abernethie had been consulted, and found to approve of the invention; and that the paper was signed before he was seen only because it was not convenient to the defendants to remain. The plaintiff assented to this, and received the writing on those terms. That being proved, there was no agreement.

(WIGHTMAN, J., not having heard the whole argument, gave no opinion.) Rule discharged.

*376] *BASTERFIELD *v.* SPRYE. *May* 5.

Defendant was outlawed on final process at the suit of the plaintiff. Defendant then petitioned the county court, under The Insolvent Debtors' Act, for his discharge, inserting the judgment debt in his schedule; and that Court ordered him to be discharged forthwith. Defendant then moved this Court to set aside the outlawry.

This Court set aside the outlawry on the terms of the defendant assigning to the provisional assignee, if required by the Court for relief of Insolvent Debtors, all goods belonging to him, if any, up to his final discharge, which did not vest in the provisional assignee by the vesting order, and paying the costs of the outlawry, if any, not included in the schedule, the costs of the application to this Court, and the costs of an attendance on the same matter before a Judge at Chambers.

JUDGMENT of outlawry, on final process, was signed in this cause in November, 1853, for 146*l.* 14*s.* 7*d.* On 19th December, 1853, the defendant filed his petition for relief under the Insolvent Debtors' Act, at the County Court for Lancashire, held at Lancaster; and he filed his schedule on 3d January, 1854. The schedule contained the name of the plaintiff as creditor for 146*l.* 14*s.* 7*d.* On 20th January, 1854, the judge of the county court ordered that the defendant should be discharged from the debts contained in his schedule forthwith. Notice of the insolvency had been forwarded to the plaintiff on 4th January, 1854, which the plaintiff received.

On affidavit of the above facts, *Lush*, in this term, obtained a rule calling on the plaintiff to show cause why the judgment of outlawry herein should not be set aside.

It appeared that the case had been before Crompton, J., at Chambers, who referred the parties to the full Court.

Honyman now showed cause.—A party discharged by the Insolvent

Debtors' Court is not therefore entitled to reverse an outlawry on civil process in respect of a *debt included in his schedule; [*377 Dickson *v.* Baker, 1 A. & E. 853 (E. C. L. R. vol. 28). It is true that in that case the insolvent was ordered to remain in custody for eight calendar months, which had not expired when the application to reverse the outlawry was made; and in the present case he has been discharged. But it does not appear that that circumstance formed any ground for the judgment of the Court. In Nicholson *v.* Nichols, 3 Dowl. P. C. 326, indeed, Patteson, J., on an application to set aside an outlawry, pointed out the existence of that circumstance in Dickson *v.* Baker: and he granted a rule Nisi for setting aside the outlawry, the outlaw to remain in custody till the expiration of the detention awarded by the Insolvent Debtors' Court: but it does not appear what became of the rule. In Hamlin *v.* Crossley, 8 A. & E. 677 (E. C. L. R. vol. 35), this Court refused to interfere by prohibiting the Insolvent Debtors' Court from discharging an insolvent who was in custody under a capias utlagatum upon final civil process: but that is no authority for setting the outlawry aside. At the time of the petition, the goods of the outlaw belonged to the Crown, and therefore did not pass to the assignees: if this application succeed, the goods will thus be kept from the assignees because they belong to the Crown. In Adcock *v.* Fiske, 6 New Ca. 17 (E. C. L. R. vol. 37), where, a party being in custody in outlawry on a judgment obtained against him, the Insolvent Debtors' Court had discharged him from the judgment debt, the Court of Common Pleas refused to charge him on the judgment in outlawry: but Bosanquet, J., explained the case, by saying: "the question is, not whether the defendant *is entitled to be discharged from the outlawry, but [*378 whether, being in custody under the outlawry, he is liable to be charged in execution for the debt sought to be recovered in this suit." So explained, the case is no authority in favour of the motion to set aside the outlawry.

Lush, contrà.—The universal practice is to discharge an outlaw on payment of debt and costs. The Crown does not acquire the property in the outlaw's goods by the judgment: but on the capias utlagatum the sheriff seizes the person and goods; and then the judgment-creditor petitions for them.(*a*) [Lord CAMPBELL, C. J.—The judgment of outlawry works the forfeiture.] It does, but not an actual transfer of property. The object of the proceeding in the Insolvent Debtors' Court is to make the insolvent a free man: by sect. 35 of stat. 1 & 2 Vict. c. 110, the remedy is given to any person in custody "upon any process whatsoever." In Hamlin *v.* Crossley, 8 A. & E. 682 (E. C. L. R. vol. 35), this Court adopted the view taken in Castelman's Case, 4 Burr. 2119, and Rex *v.* Castelman, 4 Burr. 2127, that outlawed persons were

(*a*) See the authorities in Solomon *v.* Graham, 5 E. & B. 309, 315, 6, and Arding *v.* Holmer, 1 H. & N. 85.†

within the meaning of the corresponding clause in the then Insolvent Debtors' Act. [CROMPTON, J.—You have to show that the insolvent could come in to reverse the outlawry as a matter of right. We might choose to have him amenable to ourselves. Possibly we might consider that the actual debt was discharged: but then there are the costs.] The *379] plaintiff can issue no process against the defendant *after his discharge. The judgment would include the costs; and it is scheduled.

Lord CAMPBELL, C. J.—The Court thinks that the equitable terms would be, that Mr. *Lush's* client should make over to the provisional assignee all the property which may not have passed by the proceeding in the Insolvent Debtors' Court, if required, and should pay the costs not included in the schedule.

Lush.—Required by whom?

ERLE, J.—By the Commissioners of the Court.

Per CURIAM:(*a*)—"Ordered: That, upon the defendant's making an assignment to the provisional assignee of the Court for relief of Insolvent Debtors, if required by that Court, of all goods belonging to him up to his final discharge, if any, which did not vest in him by the vesting order, and upon payment of the costs of the outlawry, if any, not included in the schedule, herein, and the costs of this application, and the summons before the Judge at Chambers, to be taxed by one of the Masters, the judgment of outlawry herein be set aside."

(*a*) Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.

*380] *JOHN TEMPERLEY *v.* JOHN SALTERN WILLETT.

May 6.

The powers of ordering the inspection of documents given by statute to the Courts of Common Law will not be exercised except for the purposes of assisting a bonâ fide suit. Therefore, where an action was commenced, not bonâ fide for the purposes of obtaining redress against the defendant, but with a view to obtain the inspection of documents in the possession of the defendant, for the purposes of obtaining evidence in another action to which the defendant was not a party, the Court refused to order an inspection.

J. C. MATHEW, in this Term, obtained a rule calling on the defendant to show cause why the plaintiff should not be at liberty to inspect a deed in the defendant's possession. The rule was obtained on the plaintiff's affidavit, which set out the declaration in this action. It appeared that the declaration was for falsely representing that a renter's free admission, which the defendant had for sale, gave his nominee a right of admission to the pit of Covent Garden Theatre Royal, whereby the plaintiff was induced to buy it; whereas it did not give such right, and the plaintiff was hindered from entering the theatre. There was no statement in the affidavit that the action was brought to recover dam-

ages for this, but only that the defendant's right to nominate depended on a deed between him and the owners of the theatre, which would be material evidence in the present cause. The affidavits in answer showed that the defendant had sold a renter's nomination, under which the plaintiff was in fact admitted to the pit in Covent Garden during the whole season; that on one occasion he claimed to enter the stalls, which, as he contended, unduly encroached on the pit; that his claim was resisted; and, as he tried to enforce it, he was given into custody; and thereupon he commenced an action against Mr. Gye, the lessee of the theatre, for an assault, and applied to the now defendant for an inspection of the deed under which he claimed *his privilege of nominating persons for a free admission, in order that the plaintiff might prove in his action against Gye that the nominee's right extended to those stalls which he had attempted to enter. This request not being complied with, the present action was commenced, as the defendant swore he believed, solely to obtain an inspection of the deed for the purposes of the action of Temperley *v.* Gye, and not with a view to redress against the present defendant. The alleged representation was positively denied; and several minor reasons given for the defendant's belief. [*381

Creasy and *Lush* now showed cause.—Discovery in equity is given in aid of an action at law; and, by the recent statutes, the same discovery may be obtained in the action itself; but here the attempt is to obtain from a witness, by a collateral fictitious action, a discovery of his title deeds, for the purpose of using them in another suit. That was not intended by the Legislature. The fact that this was not a bonâ fide suit appears clearly from the defendant's affidavits; indeed the plaintiff cautiously abstains from saying that it is.

J. C. Mathew, in support of his rule.—The plaintiff either has a right of action against the defendant, for pretending to sell him an admission to the pit when he had no such power, or against Gye for excluding him. He seeks to inspect the deed to know against which his remedy is.

Lord CAMPBELL, C. J.—The enactments giving us power to order an inspection are most salutary enactments, and have proved very beneficial to suitors: but *we must take care that they are not abused. It would be a great abuse if actions might be brought merely to obtain evidence in other actions against third persons. In the present case I think this action has not been brought bonâ fide as against Willett to obtain redress from him as defendant, but has been brought to obtain an inspection of Willett's deeds, which could not be obtained from him in his true character of a witness in Temperley *v.* Gye. [*382

WIGHTMAN, J.—I also think that this is not a bonâ fide application for the purposes of redress against Willett, but that the action has been brought solely in order to obtain an inspection of this deed, with a view to the action against Gye. The declaration is framed

alleging a representation which it appears was never made; that is evidently done solely that there may be ground for asking for an inspection of the deed; and I have no doubt the intention was, on obtaining such inspection, to drop this action and go on with that against Gye.

ERLE, J.—The Legislature has given us very extensive powers in proceedings between parties. Those powers may be used so as to oppress; and they have been conferred on the Judges in the trust that we will carefully see that those powers are used only for the purposes of the substantial question between the parties. Therefore, before I make an order on this defendant to produce a deed, I am bound to see at least that there is a colour for the complaint against him in this suit. Here I think there is not even a colourable ground for the complaint.

*383] *CROMPTON, J.—The powers are given us for the purposes of the suit, and those only. It is enough to say that I am not satisfied that this inspection is sought for the purposes of the suit, but that I believe it to be for the purposes of another suit. It is most important to check such an abuse. Rule discharged.

In the matter of an Arbitration between JOHN GRANT MORRIS and ROBERT MORRIS.

The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 8, giving the Court or a Judge power to remit matters referred to the reconsideration of the arbitrator, applies to references authorized by a submission containing a clause that it may be made a rule of Court, and not expressly excluding such power. The section is not confined to compulsory references ordered under the powers of the Act.

When an award is remitted back to the arbitrator only to set it right on the face of it, he is not bound to rehear the parties.

IN this case all matters in difference had been by an agreement of reference referred to a lay arbitrator. The submission, which was dated 29th August, 1855, contained a clause that it might be made a rule of Court; "and in case of any motion to set aside the award to be made by the said arbitrator as aforesaid, it shall be lawful for the Court to remit the matters hereby referred, or any of them, to the reconsideration and determination of the said arbitrator." No other clause relating to a reference back was contained in the submission.

The arbitrator made his award in favour of John Grant Morris, who made the submission a rule of Court, and obtained a rule calling on Robert Morris to show cause why he should not pay the amount. Cause was shown; when it appeared that the award was not good on the face of it. It was ordered by the Court that the rule should be discharged

*384] with costs, "and that the *award be remitted back to the arbitrator to set it right on the face of it." The arbitrator therefore, without rehearing the parties, made a supplemental award rectifying the error on the face of the award.

C. Milward, on behalf of Robert Morris, in this Term obtained a rule Nisi to set aside this supplemental award, on the ground that there was no authority to remit back the award, and that the arbitrator had not heard the parties.

Welsby now showed cause.—The submission provides for remitting the award only in case of a motion to set it aside: and therefore the submission by itself gives no authority for the remitter under the present circumstances. But The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 8, does authorize it. When the rule was obtained it was contended that the words "as aforesaid" in that enactment confined it to compulsory references: but that is a mistake. Sects. 3 and 4 relate entirely to compulsory references before trial. Then comes sect. 5, which empowers an arbitrator "upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule of" Court, "if it is not provided to the contrary," to state a special case. That enactment therefore refers to references by submission, as well as to compulsory references. Then sect. 6 refers only to compulsory references at the trial. Then by sect. 7: "The proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby or by the submission or document authorizing the reference, be conducted," as to "enforcing or setting aside the award, and *otherwise, as upon a reference made by consent under a rule of Court or Judges' order." This is immediately followed by sect. 8, of which the words are: "In any case where reference shall be made to arbitration as aforesaid the Court or a Judge shall have power at any time, and from time to time, to remit the matters referred." The last-mentioned "reference to arbitration" antecedent to the words "as aforesaid," in sect. 8, is that mentioned in sect. 7, "a reference made by consent under a rule of Court or Judges' order;" and the last antecedent enactment is that in sect. 7, which is also as to proceedings "upon such arbitration as aforesaid," and manifestly includes references by submission. The true construction of sect. 8 is therefore that the words "as aforesaid" include all the references mentioned in sects. 3, 4, 5, 6, and 7; that is, all references that in any way are or may be made under the authority of rules of Court. Then, the remitting here being only to rectify an error on the face of the award, it would have been wrong to hear the parties. [*385

Bovill and *C. Milward*, in support of the rule.—The express agreement in the submission to allow a remitter on a certain event excludes any remitter on any other event. And the parties should at all events have been heard.

(Lord CAMPBELL, C. J., was absent.)

WIGHTMAN, J.—With respect to the first objection, I think that the case comes within sect. 8. The words "as aforesaid" in that enactment include all the species of references provided for by previous sections,

*386] including *sect. 5: and, that being so, the Court had jurisdiction to send the award back. But then it is said that the arbitrator has misconducted himself, inasmuch as he has not heard the parties. But, the object of sending the award back being merely "to set it right on the face of it," there was no occasion to hear the parties. He has not altered the substance, but merely the form, of his award.

ERLE, J.—I also think that sect. 8 gave the Court power to remit this award, and that, when it was thus remitted, the arbitrator had no need to hear the parties.

CROMPTON, J.—The first point is of some importance. When the rule was obtained, I had feared that there had been an omission in The Common Law Procedure Act, 1854. The argument then used was that sect. 8 by the words "as aforesaid" referred to sect. 7, which again, by the words "as aforesaid," referred to sect. 6, and so that the whole was confined to compulsory references. But, when we look at the earlier part of sect. 7, it is clear that it refers, not only to compulsory references authorized by the Act, but to those authorized by a submission or document, as already mentioned in sect. 5. Unless otherwise directed by the Act, or by the submission or document authorizing the reference, references are to be subject to the same rules and enactments as to the power of the Court as upon a reference made by consent under a rule of Court or Judges' order. Sect. 8 applies to all such references. In the present case, the submission expressly provides for a reference back in a particular event; but it cannot be said to direct that the reference shall be conducted otherwise than subject to sect. 8.

Rule discharged with costs.

---

*387] *WILLIAM WICKENDEN *v.* THOMAS WEBSTER, KATHERINE ELDER, and FANNY ELDER. *May* 7.

A lease of a house contained a covenant that the lessee, or his assigns, "shall not, nor will, at any time during the said term," "convert the said demised premises, or any part thereof, into a shop or public-house, or use, exercise, follow, or carry on," "within or upon the said messuage," &c., "any public trade or business whatsoever, without the consent in writing of" the lessor; "and also that the said messuage and dwelling-house and premises, during the said term hereby granted, shall be occupied and used as a private dwelling-house only."

The lessee used the house as a day school, for girls under thirteen, for music and dancing: and a brass plate with the words "Ladies' School" was placed on the outer gate. A placard was also circulated, announcing that the lessee's Academy was open, at the premises, for the practice of dancing, for two evenings in the week; that private instruction would, if required, be given there; and that a select class for singing was open on one evening in the week. No meetings took place in consequence of this placard; and the instruction was confined to the day scholars.

Held to be a breach of the covenant.

EJECTMENT for premises in the parish of Greenwich in Kent.

On the trial, before Alderson, B., at the last assizes for Kent, it appeared that the premises consisted of a messuage and buildings in

Valentine Terrace, on The Blackheath Road; and that they had been demised by lease, by the plaintiff, to the defendant Webster, for five years from 24th June, 1852; and that Webster had underlet to the other two defendants. The lease to Webster contained a power of entry for breach of covenants. Among these was a covenant "that he, the said Thomas Webster, his executors, administrators, or assigns, or any of them, shall not nor will, at any time during the said term hereby granted, convert the said demised premises, or any part thereof, into a shop or public-house, or use, exercise, follow, or carry on, nor permit or suffer any other person or persons whomsoever to use, exercise, follow, or carry on, within or upon the said messuage or dwelling-house, buildings, and premises hereby demised, or any part thereof, any public trade or business whatsoever, without the consent in writing of the said W. Wickenden, his *executors, administrators, or assigns, for [*388 that purpose first had and obtained; and also that the said messuage and dwelling-house and premises, during the said term hereby granted, shall be occupied and used as a private dwelling-house only." The plaintiff's case was that the lease had been forfeited by a breach of this covenant.

The evidence was as follows. The defendants, Katherine and Fanny Elder, kept in the house a day school for girls between the ages of six and thirteen, in which lessons were given in music and dancing. The number of girls did not exceed twenty. On the outside gate there was a brass plate, of about eight inches long by five wide, with the words "Ladies' School." A placard had been circulated and posted, both within and without a house in Deptford occupied by "The Deptford Institution," and in a shop window, headed "Dancing in connexion with The Deptford Institution;" and the body of it was as follows. "Miss K. Elder's Academy is open for the season at her residence, 7 Valentine Terrace, Blackheath Road, Greenwich, for the practice of all new and fashionable dancing. Evenings, Mondays and Thursdays. Terms, for members of The Deptford Institution, 10*s.* 6*d.* per quarter, which commences from the time of entering. Private instructions, if required, on moderate terms, either at the above address or in families. Miss Elder continues to give lessons in singing; and her select class is open as usual on Friday evening; terms moderate." But it appeared that no meetings had taken place in consequence of this placard, and that the dancing had been confined to the regular pupils. One pupil only had slept on the premises; she was a little girl, who did so two or three times a week, on account of the weather.

*The learned Baron directed a verdict for the plaintiff, giving [*389 leave to move to enter a verdict for the defendant. In this Term, *Borill* obtained a rule Nisi accordingly.

Chambers and *Thompson Chitty* now showed cause.—In Doe dem. Bish *v.* Keeling, 1 M. & S. 95 (E. C. L. R. vol. 28), a lease contained a

covenant that the lessee should not "use or exercise, or permit or suffer to be used or exercised in or upon the same premises, or any part thereof, any trade or business whatsoever." The lessee assigned to a schoolmaster, who took possession, opened a boys' boarding-school, and distributed handbills containing the particulars of the school; and fifty or sixty boys attended the school: there was not exhibited on the premises any board or other mark showing the nature of the business. It was held that this was a breach of the covenant. In Kemp *v.* Sober, 1 Sim. N. S. 517, it was holden that a similar covenant was infringed by keeping on the premises a school for young ladies. Here the covenant is against converting the premises to "a shop or public-house," and against permitting any one to carry on upon the premises "any public trade or business whatsoever," and for using them "as a private dwelling-house only." Those words are at least as strong as the words in the cases cited. The word "public" is defined in Johnson's Dictionary (v. *Publick*, 2) as "open; notorious; generally known." Now the evidence was that a placard was exhibited, containing an account of the school, and stating it to be "open for the season." It could not be contended that, if the premises had been used as a solicitor's chambers, this would not have been a breach of the covenant to use them as a private dwelling-house only.

*390] *Bovill* and *Jacobs*, contrà.—No doubt there was a business carried on upon the premises: but the covenant, by introducing the epithet "public," shows that it was not intended to prohibit the carrying on of every business. The usual form of such covenants has not the word "public;" 4 Jarman's Conveyancing, 528 (3d ed. by Sweet); and the deviation from ordinary words makes the inserted words the more important; a principle applied to the interpretation of policies of insurance, as in Robertson *v.* French, 4 East, 130. To open a shop would have been to break the covenant. That would have been a public trade, since a customer could hardly be excluded, and an occupation in a character other than of a dwelling-house. No one dwelt in these premises except the defendants; for the single instance of a child having slept there cannot amount to a dwelling by others than the defendants. It is by no means clear that an use, by a party dwelling in the house, of some of the rooms in carrying on the business of a solicitor would be a breach of the covenant. If a painter, or a photographer, lived in the house, would he break the covenant by exercising his art there? In Kemp *v.* Sober, 1 Sim. N. S. 517, Lord Cranworth, V. C., lays a stress on the circumstance that the school was one which would probably produce annoyance: but nothing of the sort is pretended here.

(Lord CAMPBELL, C. J., had left the Court.)

WIGHTMAN, J.—I am of opinion that this rule should be discharged. The covenant is that no public business shall be carried on upon the

premises, but that they shall *be used as a private dwelling-house only. Was then the carrying on of this school a public business within the meaning of the covenant? It appears to me that it was. No distinction appears to be maintainable between a day school and a boarding school, however extensive. It is a school in either case; and there can be no doubt that the under-lessees took as many eligible pupils as they could get. There was also exhibited a public placard, announcing that there would be a select class, not merely private instruction. It seems to me that it was intended, by this advertisement, to carry on the concern on a somewhat extensive scale. That was very different from using the premises as a private dwelling-house only. [*391

ERLE, J.—I also think that this rule should be discharged. The two branches of the covenant are to be read together, and throw light one upon the other. No public trade is to be carried on; and the premises are to be used as a private dwelling-house only.

CROMPTON, J.—I think the last part removes all doubt. It could not, in common parlance, be said that this house was used only as a private dwelling-house. Rule discharged.

*DAME MARY ANN CLIFTON *v.* JAMES PHINEAS DAVIS. *May* 7. [*392

C. claimed property seized under a fi. fa. in an action of D. against A. The sheriff having applied under stat. 1 & 2 W. 4, c. 58, s. 6, a Judge ordered an issue to try C.'s right, C. to be plaintiff, D. defendant. By the verdict, C.'s claim was affirmed for more than five-sixths, but negatived as to the residue. The Court directed the costs to be taxed upon the principle of each party having succeeded as to a part, without reference to the fact which was plaintiff and which defendant.

THIS was an interpleader issue. The defendant had recovered a judgment against Sir Robert Juckes Clifton, Baronet, for 17,600*l.*, with interest and costs; and had issued a fi. fa. endorsed to levy 8803*l.* 10*s.* Under this writ, the sheriff seized certain goods. The present plaintiff, Lady Clifton, the mother of Sir R. J. Clifton, claimed a large portion of them as her property, and called upon the sheriff to relinquish possession. A Judge's order was made for the trial of this issue, as to the present plaintiff's right; the present plaintiff to be plaintiff, the execution-creditor defendant. On the trial, the plaintiff had a verdict in respect of part of her claim, to the value of more than 1300*l.*; but the defendant had a verdict for the residue, to the value of 228*l.* 18*s.* 4*d.* The plaintiff and defendant each delivered bills of costs to the Master, who allowed the costs of the plaintiff, but refused to allow any costs to the present defendant (the execution-creditor).

The present defendant then took out a summons for the Master to review his taxation. The summons was heard before Erle, J., who de-

clined to make any order. The Master thereupon made his allocatur, in conformity with the view which he had taken.

In this Term, *Mellor* obtained a rule calling on the present plaintiff to show cause why the Master of this *Court should not be at liberty to review his taxation of costs herein.

*393]

Field now showed cause.—Both parties appear by the event to have been wrong: the claimant in claiming too much, the defendant in seizing too much. But the plaintiff has recovered; if this were an ordinary action, though the defendant has succeeded in reducing his liability, the plaintiff would be entitled to the general costs. Now the proceedings under sect. 6 of stat. 1 & 2 W. 4, c. 58, are for the protection of the sheriff, not of the execution-creditor: the same rule therefore should be applied as in ordinary actions. [CROMPTON, J.—By the statute of Gloucester (1 stat. 6 Ed. 1, c. 1, s. 2), costs were recoverable generally by a successful plaintiff: then stat. 1 & 2 W. 4, c. 58, s. 6, gives a different rule in the case of an interpleader issue at the instance of the sheriff, by enacting that "the costs of all such proceedings shall be in the discretion of the Court." The proceedings are caused by the claim.] They are rather caused by the seizure of the claimant's property. [Lord CAMPBELL, C. J.—Suppose the claimant had claimed no more than she was, as it turns out, entitled to?] The proceedings must have taken place nevertheless; for the defendant insisted on retaining that part also. [WIGHTMAN, J.—The Court might have made the present defendant the plaintiff in the interpleader issue.] That would not have been fair, because his wrongful act has made the proceeding necessary; the present plaintiff had no means of getting what she is in fact entitled to, except by making the claim: and, when she has made the claim, she is obliged to attend the summons and become a party, unless she abandons her right. The execution-creditor has not suffered by the overclaim: he does not *give up a part and claim to retain the rest; had he done so, the case might have resembled that of a divisible issue in an ordinary action, such as that in Routledge *v.* Abbott, 8 A. & E. 592 (E. C. L. R. vol. 35); (*a*) but he resists as to all. The whole of the general costs must have been incurred by the plaintiff, even if she had confined her claims to the portion as to which she has succeeded. The Master finds nothing due exclusively for that portion as to which the defendant has succeeded. [Lord CAMPBELL, C. J.—That is on the assumption that you are to have the general costs.] What other principle could be suggested? [Lord CAMPBELL, C. J.—That each is in the character of an actor. and therefore costs should be given without any reference to the fact of which is plaintiff and which defendant. CROMPTON, J.—Often the circumstances of the case throw the issue on the other side. What unfairness would result

*394]

(*a*) See Lewis *v.* Holding, 2 M. & G. 875 (E. C. L. R. vol. 40); MacCarthy *v.* Nepean, 6 Q. B. 252 (E. C. L. R. vol. 51).

from your principle? Suppose you recovered only five shillings.] The Judge has thought this a case in which the claimant was the proper party to be the plaintiff. [Lord CAMPBELL, C. J.—But not with a view to the costs.] They follow as a legal consequence.

Mellor, contrà, was not called upon.

Lord CAMPBELL, C. J.—The costs should be taxed without reference to the fact which was plaintiff and which defendant. Each has been partially successful. The Master will ascertain which, and how far, has succeded substantially.

WIGHTMAN, J., concurred.

*ERLE, J.—The plaintiff is entitled to all her costs in respect of the matter as to which she succeeded; the defendant to the costs of all necessary for setting up his case. [*395

CROMPTON, J.—The general principle of ordinary actions is not applicable. There are no general costs: neither party is to be considered victorious: or rather, as it would perhaps be better expressed, each party is victorious pro tanto. Rule absolute.

The QUEEN *v.* WARNER and Others. *May* 7.

The Local Authority under The Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), for the purpose of rendering innocuous a ditch, by which the filth was conveyed from certain houses, and which constituted a nuisance, constructed a sewer, and, for the purpose of defraying the expense, under sect. 22, assessed the houses then using the ditch or the sewer at an annual sum, amounting to 6*d.* in the pound on the assessment to the highway rate. By a separate resolution, passed afterwards on the same day, it was resolved that the annual payment might be compounded for, within two months after service of notice of assessment, by payment of the amount of four years' annual payments; after one year from the date of the assessment, by payment of the amount of three and a half years' annual payments: after two years, by payment of the amount of three years' annual payments; after three or more years, by payment of the amount of two years' annual payments; all arrears in every case having been first paid up: in default of such composition, the payment to be perpetual.

Notice of the assessment, containing also, on the same paper, a notice of the subsequent resolution, was served upon the owners and occupiers. Payment being refused by an occupier, justices were applied to for a warrant of distress, which they refused to grant. On motion to this Court for an order upon them to do so, Held:

That, supposing the resolution respecting the composition to be illegal (and *semble* that it was not), it was a matter distinct from the rate, which therefore was not invalidated by it.

That the rate was not bad for being confined to houses then using the ditch or sewer.

And although it was not published or allowed as required in the case of a highway rate by stat. 5 & 6 W. 4, c. 50, s. 27.

Order made.

ASPLAND, in this Term, obtained a rule calling on Henry Warner, Edward Huggins, and William Peter Bodkin, Esquires, three justices in and for *Middlesex, and Horatio Peacock, to show cause why the said justices, or some two of them, should not issue their warrant for levying, by distress and sale of the goods and chattels of the said H. Peacock, the sum of 9*s.*, being the amount of an assessment [*396

made by The Local Authority for the execution of The Nuisances Removal Act for England, 1855, in the parish of Hornsey, in the said county, upon premises in the occupation of the said H. Peacock. From the affidavits, in support of and opposition to the rule, it appeared that the Board for the repair of the highways of the parish of Hornsey in Middlesex was, and had been since the coming into effect of The Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), The Local Authority to execute the Act in that parish. That complaints had been made to the Board, before and after the passing of the Act, of the foul condition of certain ditches and watercourses near a highway called Maynard Street, the ditches, watercourses, and highway being in the parish and within the jurisdiction of the Board. The ditches and watercourses were used for conveying water, filth, sewage, and other matters from houses and premises adjoining, and, among these, from a house and premises occupied by Horatio Peacock, in Maynard Street. They were in fact so foul as to be injurious to health, and constituted a nuisance within the meaning of the Act. The Board found that the nuisance could not, in their opinion, "be rendered innocuous without the laying down of sewers and of other structures along the same, or part thereof, or instead thereof." And, on 20th September, 1855, the Board caused a notice to be served at each of the houses and premises using the drains and watercourses, that The Local Authority

*397] had had an *estimate prepared of the costs of doing the work necessary to remedy the nuisance, and that it was intended to assess the premises towards the work in a specified sum in the pound, payable annually, and naming 1st October, 1855, for receiving a deputation of not more than three persons from the district if it were wished to make any communication upon the subject. No deputation attended. The Board proceeded to lay down sewers and other structures, partly along the course of the ditches and watercourses, and partly instead thereof; and, after the works were for the most part completed, did, on 17th December, 1855, assess the houses, buildings, and premises which had used or partly used, for the purposes in the said Act mentioned, the ditches and watercourses which caused the nuisance complained of, and the existence of which nuisance made the said works for the removal of such nuisance necessary, to certain annual payments, which the said Board, as such Local Authorities as aforesaid, thought just and reasonable. The affidavit set out the entry in the Special Assessment Book of the Board, which stated that they did, in pursuance of the power vested in them by the Act, &c., "assess the houses, buildings, and premises hereafter named, and which now use, for the purposes of (*a*) the said Act named, the ditch, gutter, drain, watercourse, sewer, and other structures lately made by us under the powers and obligations imposed on us by the said Act, to the annual payment of the

(*a*) Sic.

several sums set opposite to the description of each of such houses, buildings, and premises respectively, which sums, so assessed, are estimated at and after the rate of 6*d.* in the pound upon the several sums set opposite to the said *description of each of such houses, buildings, and premises respectively, as the rateable value thereof." [*398
In this assessment Peacock's house was assessed to the annual sum of 9*s.*, which was only sixpence in the pound on the assessment then in force to the highway rate. Notices of the assessment were served at the premises upon the owners and occupiers, including the premises of Peacock. The following was the form of notice.

"Notice of assessment.

"Parish of Hornsey.

"Assessment under the Nuisances' Removal Act, 1855.

"(Maynard Street Drainage.)

"Mr.

Take notice, that the and premises by you, and situated in in this parish, and which use a certain ditch, gutter, drain, watercourse, sewer, and other structures lately constructed by the local authority, have been, on the 17th day of this present December, assessed by the said local authority to the annual payment of , being at and after the rate of sixpence in the pound upon the rateable value of the said and premises. And take notice, that payment of the sum so assessed is due at the expiration of fourteen days from the day when this notice is left on the premises; and the same will be applied for on Wednesday, the 9th day of January next.

"By order of the local authority,

"WILLIAM POTTER, Collector,

(residing at High Street, Highgate, in the said parish).

"Dated this 22d day of December, 1855.

*"N. B. Your attention is called to the following resolution, which was passed by the local authority, in reference to the above assessment, on the 17th day of December. [*399

"'Resolved: that the annual payment of the sums mentioned in the assessment of houses, buildings, and premises this day made, and contained in the special assessment book, under the name of Maynard Street Drainage Assessment, shall be allowed to be redeemed, compounded for, and acquitted, by the payment, at any time within two months after service of notice of such assessment, of the amount of four years of such annual payments; after the expiration of one year from the date of the order of assessment (the first year's payment having been made), by payment of the amount of three and a half years' annual payments; after the expiration of two years from the same time, by payment of the amount of three years' annual payments; after the expi-

ration of three or any future number of years from the same time, by payment of the amount of two years' annual payments; on condition, in every case, that all arrears of annual payments then already due be first paid up; and that such assessment be and remain, in every case, unless and until thus redeemed and acquitted, a perpetual annual payment.'"

It was deposed, in support of the rule, "that the resolution, a copy of which is printed on the lower part of the paper containing the said notice, and which is distinct from the said notice itself, as appears by the copy" annexed, "was a resolution altogether distinct and apart from the order of assessment itself, and was determined upon and passed for the ease and convenience of those whose premises were
*400] assessed as aforesaid, *and in order that any person who chose to pay any of the amounts therein named might, by possession and production of the receipt," a form of which was annexed, "have an answer to any summons for payment of the annual sum assessed upon the premises named in such receipt, or to any application to the Court of Queen's Bench to compel any justices to issue process for the recovery of such annual sum." The time for appeal, under sect. 22 of The Nuisances Removal Act for England, 1855, had expired; and no party had appealed against the assessment or objected to it; and the works had been completed. Payment of the first annual sum, under the assessment, was demanded of Peacock, after fourteen days had elapsed from the service of the notice upon him: but he had refused to pay. It was deposed that his premises were greatly benefited by the works. On 23d January, 1856, a notice was served upon him, to the effect that, unless he made payment before 8 o'clock, P. M., on 26th January, a summons would be taken out to enforce payment. And, the money still remaining unpaid, a summons was taken out, calling upon him to appear before two or more justices to show cause why he had not paid: otherwise he should be proceeded against. The summons came on for hearing (together with summonses against other parties similarly situated) before Messrs. Warner, Huggins and Bodkin, on 11th February, Peacock appearing by his attorney. The existence of the nuisance and the jurisdiction of the Board were admitted: and the making of the assessment, the service of the notices, and the incurring of the expense by the removal of the nuisance, were proved: and the justices were requested to issue a warrant of distress: but some legal objections were
*401] taken *on behalf of Peacock: and finally, the justices refused to grant the warrant, which refusal was given by them in writing, in the terms following.

"We have had so much difficulty in coming to a decision on the construction of the 22d section of The Nuisances Removal Act, that we have determined upon refusing to grant distress warrants. We have not overlooked the provisions of the 5th section of Jervis's Act, 11 &

12 Vict. c. 44, which will afford the parties an opportunity for obtaining the decision of a superior Court on the law."

The assessment had not been allowed or published, as required in the case of a highway rate by sect. 27 of The General Highway Act, 5 & 6 W. 4, c. 50.

Honyman now showed cause.—The Board for the Repair of the Highways, under the General Highway Act, 5 & 6 W. 4, c. 50, s. 18, has become, by The Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121, s. 3), The Local Authority for the execution of the last-mentioned Act. Under sect. 22 they had power to execute the works in question, and "to keep the same in good and serviceable repair," and "to assess every house, building, or premises then or at any time thereafter using, for the purposes" of conveying the water, filth, and sewage, the ditches and watercourses, or the sewer and other structures, "to such payment, either immediate or annual, or distributed over a term of years, as they shall think just and reasonable:" and, after fourteen days' notice, they had the same remedies for levying and collecting the sums assessed, as in the case of highway rates, subject to the same power of appeal. It is also added that "the provisions contained in this *section shall be deemed to be part of the law relating to highways in England," meaning, perhaps, that the General High- [*402 way Act shall be incorporated in this Act. Peacock has been assessed at the annual sum of 9*s.*, by an assessment professedly applicable only to houses "now" using the old ditches and watercourses or the new sewers and structures. On the same day a resolution is passed, of which notice is given in the notice of the assessment, the effect of which is to exonerate, upon payment of a sum amounting to the payments due in a certain number of years, the premises from all subsequent payments. That is not authorized by sect. 22. [WIGHTMAN, J.—Suppose no one took any notice of that. Lord CAMPBELL, C. J.—Suppose the resolution illegal, how can that affect the liability to pay the annual assessment?] It makes a part of the assessment. [Lord CAMPBELL, C. J.—Suppose the resolution were made on a different day.] It might then be separated from the assessment. Even if this part of the assessment be omitted, the assessment is bad; it is a perpetual assessment upon only the houses using the drains, &c., at the time of the assessment made, without any provision for future houses. That some such provision was intended in such case to be made, seems to follow from the words of sect. 22, "then or at any time thereafter using." It is not, indeed, easy to see how this part of the enactment can be carried out at all. [ERLE, J.—Have they power to assess from time to time?] They have: but this assessment is for the expense of making the drain. [WIGHTMAN, J.—That must be defrayed at once, by the assessment of the parties now benefited: the assessment in respect of keeping in repair might be made so as to include future houses.] Treating this as an

*403] assessment *under the General Highway Act, it is bad for not having been published and allowed as required by stat. 5 & 6 W. 4, c. 50, s. 27; Sibbald *v.* Roderick, 11 A. & E. 38 (E. C. L. R. vol. 39). The time for appeal, by sect. 105 of the statute last mentioned, incorporated for that purpose in The Nuisances Removal Act for England, 1855 (by sect. 22), was the next practicable sessions, which had expired before the hearing.

Aspland, contrà, was not called upon.

Lord CAMPBELL, C. J.—This rule should be made absolute. The resolution as to the mode of compounding is not part of the rate. Mr. *Honyman* allows that, if it were passed on a day subsequent to that on which the rate was made, it would not be so: and I think the fact that it was passed on the same day makes no difference. Even if it were part of the rate, I do not know that any objection could be made applicable to the case of those who pay immediately, or who pay at a distant time. As to the rate not including houses not yet in existence, I cannot say that it is bad for not doing what it was not possible to do. Should houses hereafter be built, which shall use the sewer, they may be brought into charge.

WIGHTMAN, J.—I am of the same opinion. The arrangement for compounding is a matter separate from the rating. Mr. *Honyman* admits that it would be separate if made on a subsequent day; and I think that no difference is produced by its being made on the same day. Nor do I see anything inconsistent with the Act in allowing an immediate payment.

*404] *ERLE, J.—I can find no objection to the validity of this rate. A duty is cast on the Local Authority to remedy a nuisance injurious to health; and they do this by constructing a sewer. They are empowered to lay on a rate to cover this expense; and this, by sect. 22, may be done, either by requiring an immediate payment, or by distributing the expense over a term of years. The expense incurred in this year may be laid on the houses which now derive benefit from the work. The Board want, in all, 2*s.* in the pound: and they go as near to the statute, and to the convenience of the case, as they can. They lay an annual rate of 6*d.* in the pound; and they say, if you now pay for four years, that shall discharge you: and they do not stop there; they say, after one year's payment, you shall be discharged by paying the amount of three and a half years' payments; after two years, by the payment of three years' annual payment; after three or more years, by the payment of two years' annual payment. That does not seem an unfair equivalent for the annual payment of the 6*d.* in the pound, upon which the annual 9*s.* was calculated.

CROMPTON, J.—I think we should make this rule absolute, and so protect the justices in issuing their warrants. At the same time, I confess that I do not quite perceive the meaning of the Act.

Rule absolute.

*HENRY SMITH *v.* The GREAT WESTERN RAILWAY COMPANY. [*405

The costs of orders for interrogating the opposite party, and for the inspection of documents under The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), are, by sect. 57, in the discretion of the Judge making the order. If the order is silent, they will not be allowed as costs in the cause for the interrogating party, though he is successful.

THIS was an action for the infringement of the plaintiff's patent for the manufacture of a particular species of wheel for railway carriages. The substantial controversy was whether the wheels used by the defendants were infringements of the patent. Erle, J., made an order, at the instance of the plaintiff, that Daniel Gooch, an officer of the defendants, should answer certain interrogatories, and also should answer an affidavit stating what documents they had in their power, &c.

The interrogatories pointed principally to the construction of the wheels used by the defendants. Gooch in his answer said, in effect, that he could not explain the construction of the wheel, except to a person who had the wheel before him. On the plaintiff's application, Crompton, J., made an order that the plaintiff, with two engineers, might inspect one of the wheels, and that, unless Gooch attended and gave information on such inspection, he should be examined orally before the master. The inspection took place; Gooch attended, and explained the wheel. The result was that there appeared to be an infringement: and the defendants consented to judgment being signed against them for 200*l.* and costs. Neither the order of Erle, J., nor the order of Crompton, J., contained any provision as to the costs of these orders.

*The master, on taxation, allowed the plaintiff, 1st, the costs of the summons ending in the order of Erle, J.; 2d, the costs of the summons ending in the order of Crompton, J.; and, 3d, the costs of the inspection of the wheel. [*406

Hugh Hill, for the defendants, in last Michaelmas Term, obtained a rule to review the taxation.

Mellish, in the same term (November 26th), showed cause.(*a*)—The order of Erle, J., was made under The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), sects. 50 and 51. Neither of these sections gives any directions as to the costs. The order of Crompton, J., was made on an application under sect. 53, which enacts that the Court or the Judge may, in the order, impose such terms as to "the costs of the application, and of the proceedings thereon, and otherwise, as to such Court or Judge should seem just." The costs of any proper step in the cause are the successful party's costs in the cause, unless there be something to deprive him of them: here there is nothing to do so; for, though Crompton, J., had power in his order to impose any terms as to

(*a*) Before Lord Campbell, C. J., Coleridge, Wightman and Erle, Js.

costs, he imposed none. In Hill *v.* Philp, 7 Exch. 232,† the Court of Exchequer seem to have laid down a general rule that the costs of inspection should be paid by the party seeking it. That was under stat. 14 & 15 Vict. c. 99, s. 6. The Court seem there to have gone on a false analogy to the proceedings in equity. It is true that on a bill for discovery merely the plaintiff does not get costs; but in a bill for discovery and relief the plaintiff, if he obtains relief, gets his costs; and, *407] if *the party obtaining discovery under stat. 14 & 15 Vict. c. 99, and stat. 17 & 18 Vict. c. 125, is ultimately successful, the analogy is to discovery and relief, not to discovery merely. If the matter were still in the discretion of the Court, the costs should, in this case, be allowed; for the discovery terminated the cause.

Hugh Hill, contrà.—The only decision as to costs is Hill *v.* Philp. There the decision was that the interrogating party was to pay the costs of the inspection under the Evidence Act (14 & 15 Vict. c. 99). The Court made the costs of the defendants' unsuccessful attempt to set aside the Judge's order costs in the cause for the plaintiff; but that does not justify the proposition in the marginal note that the costs of the application were to be costs in the cause. The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), by sect. 57 puts all costs in the discretion of the Judges. The principle on which the Common Pleas acted in Bridges *v.* Fisher, 1 New Ca. 510 (E. C. L. R. vol. 27), was analogous to that which it is now contended by the defendants ought to guide that discretion. *Cur. adv. vult.*

Lord CAMPBELL, C. J., in this term (May 8th), delivered judgment.

In this case the plaintiff applied for and obtained an order to interrogate an officer of the defendants, the railway Company, upon the point whether they infringed his patent by the use of the patent wheel, and interrogated him accordingly. The plaintiff obtained a second order for the production of a wheel, referred to by the officer in his *408] answers to the first interrogatories, in the *presence of two scientific witnesses, with the attorney of the plaintiff; and under this order there were two attendances. These orders gave no directions as to costs. The plaintiff afterwards became entitled to the costs in the cause; and the Master has allowed all the costs of these proceedings as costs in the cause for the plaintiff. On a rule to review, the question is, whether all or any of these costs ought to be allowed. And we consider that by The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), sect. 57, they were in the discretion of the Judges who made these orders; and, as they gave no directions, the party making the application has no right to claim the costs of such applications as costs in the cause for him.

We may add that we see no circumstances in this case entitling the plaintiff to the costs of these proceedings, if we had now to decide the question according to our discretion. Rule absolute.

The QUEEN *v.* JAMES HUNT. *May* 8.

Stat. 7 & 8 Vict c. 101, s. 39, makes the decision of the auditor of the poor law on any question as to an attorney's bill final, at all events as against the overseers, unless the bill has been taxed before it is presented to the auditor; and therefore the Court cannot grant, at the instance of the overseers, a certiorari to bring up such a disallowance of such a bill of costs. Whether, if the complaint were by a rate-payer that the bill was improperly allowed, the decision of the auditor would be final as against the rate-payer, because the bill was not taxed, *Quære.*

BITTLESTON, in this term, on behalf of the overseers of the poor of the parish of Napton, in the county of Warwick, obtained a rule Nisi for a certiorari to remove into this Court the disallowance by James Hunt, the auditor of the Oxfordshire and Warwickshire *audit district, of 26*l.* 18*s.* 9*d.*, the amount of an attorney's bill of costs paid by the overseers, and his reasons. From the affidavits it appeared that the bill of costs was incurred for parish business, and that it had not been taxed before it was presented to the auditor. The auditor gave various reasons for the disallowance, of which it is only necessary to notice the last. "Lastly, although I have assigned the foregoing reasons in compliance with the request of the overseers of the said parish of Napton, inasmuch as such bill of costs was not taxed before it was presented to me, my decision as auditor on the reasonableness as well as the legality of the charges therein contained is, nevertheless, pursuant to the statute in that case made and provided, final and conclusive." [*409

Hayes, Serjt., and *Robert Hall*, now showed cause.—The disallowance by the auditor of an item is not of such a judicial nature as to be removable by certiorari at common law; but stat. 7 & 8 Vict. c. 101, s. 35, gives the certiorari. But sect. 39, of the same Act, enacts that, on the application of the parish officers or attorney, the clerk of the peace shall, if required, tax any bill of costs in respect of parish business, "and the allowance of any sum on such taxation shall be primâ facie evidence of the reasonableness of the amount, but not of the legality of the charge; and the clerk of the peace shall be allowed for such taxation after the rate to be fixed from time to time by the master of the Crown office, and declared by an order of the said Commissioners; and if any such bill be not taxed before it is presented to the auditor, the auditor's decision on the reasonableness as well as the legality of the charges shall be final." This *is a bill of costs; it was not taxed before it was presented to the auditor; he has decided that the charges ought not to be allowed; and therefore his decision is final. [Lord CAMPBELL, C. J.—It is final as to the legality of the charges. What is meant by the word legality here?] It must mean the legal liability of the parish to pay them; it would otherwise mean no more than reasonableness. [ERLE, J.—Is there any reason why the Legislature should give an appeal to every one else, and take [*410

it away from an attorney unless the bill has been taxed?] It may be for the purpose of enforcing the taxation of the bills.

Pashley and *Bittleston*, in support of the rule.—The right to certiorari cannot be taken away by general words; Rex *v.* Jukes, 8 T. R. 542. [Lord CAMPBELL, C. J.—That is true where the certiorari is by common law. Here it is the creature of an enactment; and we are to construe a proviso on that enactment, by which, in a particular case, the decision is to be "final." What effect is given to that word, if the decision is subject to appeal?] It may be rejected altogether. If a rate-payer applied for a certiorari to bring up the allowance of a bill of costs, which as he said had been improperly paid by the overseers and improperly allowed, he would, according to the argument be deprived of his remedy unless the bill were taxed, and that though the bill can be taxed only at the instance of the overseers or the attorney. It could never be intended that the rate-payer should have a power of appeal if the bill was taxed, and should lose it if, by the default of those whose act he questioned, it had not been taxed. That shows that some limit *411] *must be put upon the word "final," or the use of it will lead to absurd results.

Lord CAMPBELL, C. J.—I am of opinion that the certiorari does not lie in this case. I expected that the argument probably would be that legality meant something different from liability, though I did not see what meaning could be put on the word; but it is not disputed that legality here includes liability, and that, as far as the certiorari is concerned, it is all one whether the decision of the auditor has been on the reasonableness of the charges or the liability of the parish to them. Then, that being admitted, the case seems to me clear. Sect. 35 gives the certiorari in terms quite wide enough to include the case at bar; but on it comes, as a proviso, sect. 39, which seems to me to indicate, in terms as clear as language can furnish, that if the bill be not taxed before it is presented to the auditor there shall be no certiorari. "The auditor's decision on the reasonableness as well as the legality of the charges shall be final." Why is the decision of this auditor not to be final? Mr. *Pashley* boldly says that the words are to be of no effect. But we are bound to give effect to what appears to be the intention of the Legislature. It is true that, where a certiorari would lie by common law nothing but express words will take it away; but this is a very different case. The certiorari here is given by way of appeal against decisions of the auditor. It would not lie without an express enactment; and in the same statute it is declared that, under certain circumstances, the decision shall be final; that takes such cases out of the enactment giving the certiorari. Mr. *Bittleston* argued in a manner *412] that made a much greater impression on *me, viz.: that, if the full effect was given to the word "final," the enactment would lead to absurd results. But, as it seems to me, no other sense can be

given to the word than that the decision of the auditor that the parish is not liable shall be conclusive. I am not bound to inquire whether this is reasonable or not. Where the words of the Legislature may bear two meanings, by all means let us take the more reasonable meaning; but in such a case as this, where the words can bear but one meaning, I obey without inquiring whether the enactment is reasonable or not.

WIGHTMAN, J.—I own I find it difficult to imagine what could be the object of the Legislature: but I feel bound by the words of the enactment, which, unless the word final be rejected altogether, can, I think, bear no meaning except that the decision shall be without appeal.

ERLE, J.—I do not differ from the conclusion to which my Lord and my brothers have come; but I find myself unable to construe this enactment at all. I think it is clearly our duty, if it be possible, to find a rational meaning for the words of the Legislature; and I can find no rational purpose that can be answered, if the meaning of this enactment be that the decision of the auditor should be subject to an appeal on every subject except this one. The auditor has no necessary qualifications to insure that his decisions on any subject shall be right; and the Act provides that there may be an appeal from any decision of his, by sect. 35, to this Court, or, by sect. 36, to the Poor Law Commissioners if the matter is supposed to be less of law than discretion. Clearly, therefore, the Legislature looked upon the auditors as fallible, and thought it right that their decisions, in general, should be [*413 subject to review. Then comes sect. 39, referring to attorneys' bills, that being a subject, most of all others, requiring a peculiar species of knowledge not likely to lie within the knowledge of an auditor: and it is supposed that the Legislature have made it a condition precedent to any appeal on that subject, that the bill should have been previously subject to taxation, that taxation being, it is to be noticed, ex parte. I cannot see what purpose can be answered by this. Looking at the tenor of the section, the scheme of the Legislature seems to have been that, if the bill was taxed, the taxation should be primâ facie evidence of the reasonableness of the amount, but not of the legality; but, if the bill is not taxed, the auditors shall decide alike on the reasonableness and the legality of the charges. I had been for some time in hopes that I might find language to express this meaning: but it is impossible to do so without inserting words in the section; for it is enacted that his "decision on the reasonableness as well as the legality of the charges shall be final," and not that his decision on the reasonableness shall be made in the same manner as on the legality of the charges. Neither can I read "final" as meaning "final, unless appealed against." Probably that was the object of the Legislature: but it cannot be done without reforming the words of the statute; and therefore I agree that this rule must be discharged.

CROMPTON, J.—I do not see that the construction I put upon the words of the Legislature leads to an absurdity: but, whether it does or not, I must give the word "final" some meaning; and I think it can *414] be no *other than that the decision shall be final, that is, not subject to the appeals given in the previous sections. It is very true that the prerogative to issue a writ of certiorari cannot be taken away without express words: but that is where the nature of the proceeding is such that the writ would at common law apply to it, and some enactment is said to provide that it shall not apply. Here the question is whether the writ is given by this Act. Mr. *Bittleston* argues that, if the decision of the auditor is final when he disallows the bill, it must be final also when he allows it, and that it could not be intended that the omission of the overseers to have the bill taxed should make a decision in their favour final against a rate-payer. That was the strongest argument used. I doubt, however, whether the decision would be final as against the rate-payer. I read the section thus: the parish officers may have the bill taxed; if they fail to tax it, then as against them the decision of the auditor shall be final: they shall not challenge his decision as to either the reasonableness or the legality of the charges. The object of the Legislature (no matter whether wise or not) seems to have been to cause parish officers to tax their bills before they pay them. If they do not, the decision is to be final as against them. We need not now decide how it would be as against a rate-payer.

Rule discharged.

---

*415] *The QUEEN *v.* The GENERAL CEMETERY Company.

A company incorporated under an Act containing clauses to the same effect as The Companies' Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), were called upon to register a memorial of a deed conveying much other property, and also some shares in the Company, by way of mortgage. They refused to do so, on the ground that the deed was not to the like effect with the statutable form of transfer given by the Act. A rule Nisi for a mandamus having been obtained,

Held, that they were justified in refusing to register the deed, as it differed from the simple statutable form of conveyance. Rule discharged.

LUSH, in this Term, obtained a rule Nisi for a mandamus commanding The General Cemetery Company to register in the register book of the Company the name of Thomas Bright, as proprietor of twenty shares, specifying their numbers. From the affidavits it appeared that the registered proprietor of those shares had mortgaged them, together with other property; that the mortgagee had filed a bill for a foreclosure; that Bright had advanced the money necessary to pay him off; and that an indenture had been executed by the original mortgagor, in whose name the shares still stood, the mortgagee and Bright, reciting all these matters, whereby the whole property, including the shares,

was transferred to Bright by way of mortgage. Nothing further as to the contents of the deed appeared on the affidavits. The reasons for the refusal of the Company were contained in the following letter from the Company's solicitors to those of Bright. "With reference to your application for the registration of a memorial of the deed of assignment to your client, Mr. Bright, we beg to say that the Company has been advised by counsel that the assignment is not such a transfer as the Company can, under any circumstances, so far recognise as to enter a memorial thereof. The Company can only enter memorials of absolute transfers in which the required acceptance of the *transferree is contained." The General Cemetery Company are incorporated [*416 by stat. 2 & 3 W. 4, c. cx.,(a) which is not by any subsequent Act made subject to The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); but the Act contains provisions for the division of the stock of the undertaking into shares of 25*l.* each, for the payment of calls by the shareholders, for voting and receiving dividends, and for the transfer and transmission of shares, to the same effect as those contained in The Companies Clauses Consolidation Act, 1845. The sections material to the point now discussed were:

Sect. 90. "That it shall be lawful for the several proprietors of any share or shares in the said undertaking, and his, her, or their respective executors or administrators," "to sell and dispose of any such share or shares," "subject to the rules and conditions herein mentioned and provided; and the form of conveyance of shares may be in the following words or to the like effect, varying the names and descriptions of the contracting parties as the case may require; that is to say, I of , in consideration of paid to me by of , do hereby assign and transfer to the said , share [or shares, *as the case may be*,] numbered , of and in the undertaking called The General Cemetery Company, upon which share [*or* upon each of which shares] the sum of hath been paid; to hold the same unto the said his or her executors, administrators, and assigns, subject to the same conditions as I held the same immediately before the execution hereof; and I *the said [*417 do hereby agree to accept and take the said share [*or* shares] subject to the same conditions. As witness our hands and seals, the day of And on every such sale the said deed or conveyance, being executed by the seller or sellers, and the purchaser or purchasers of such share or shares, shall be kept by the clerk of the said Company, who shall enter in some book to be kept for that purpose a memorial of such transfer and sale, and endorse the entry of such memorial on the said deed of sale or transfer, for which entry and endorsement the sum of 2*s.* 6*d.*, and no more, shall be paid by

(a) Local and personal, public: "For establishing a general cemetery for the interment of the dead in the neighbourhood of the Metropolis."

the purchaser or purchasers to the said clerk; and the said clerk is hereby required to make such entry or memorial accordingly, and, upon request, to endorse a memorial of such transfer on the back of the certificate of each share so sold, and deliver the same to the purchaser for his or her security, for which endorsement the sum of 2*s*. 6*d*., and no more, shall be paid; and until such memorial shall have been made and entered as herein declared, such purchaser or purchasers shall have no part or share of the profits of the said undertaking, nor any interest for such share or shares paid to him, her, or them, nor any vote or votes in respect thereof, as a proprietor or proprietors of the said undertaking."(*a*)

Sect. 91 was equivalent to stat. 8 & 9 Vict. c. 16, s. 16.

Sect. 96 provided for ascertaining the proprietorship of shares passing by marriage, death, or "by any other legal means than by a transfer and conveyance thereof, duly made and executed as hereinbefore directed." The provisions in this section were nearly equivalent to those contained in stat. 8 & 9 Vict. c. 16, ss. 18 and 19.

*418] *Sect. 97 exempted the Company from being bound to regard trusts.

Unthank now showed cause.—The scheme of the clauses as to the transfer of shares, which formerly were inserted in every special Act, and now are contained in The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), was to establish a system like that which prevails as to the funds. All transfers by the acts of the parties were to be by a simple deed, transferring the absolute legal interest, with the right to vote, and the liability to pay calls; if the object is to convey the shares as a mortgage or in trust, that must be carried out by a separate declaration of trust which is not to appear on the register. This appears by the provisions that the conveyance is to be kept by the clerk of the Company; it is not intended that he should keep deeds forming the title to other property. The clauses as to transfer apply, not only to sales, but to all conveyances by act of the parties; Copeland *v.* North Eastern Railway Company, antè, p. 277.

Lush, in support of his rule.—The Company are not bound to regard trusts, and therefore can suffer no prejudice from the form of the deed. Sect. 90 applies only to sales; and the adoption of the form of the conveyance is only optional.

Lord CAMPBELL, C. J.—It is clear that the mandamus should not be awarded unless it is shown that the deed is of such a description that the Company are bound to register a memorial of it. I think this is a transfer under sect. 90, and not a case of transmission. If then

*419] *this deed is such a deed of transfer as the statute contemplates, and which the Company are bound to register, they are also bound to keep it, which would be very inconvenient for all parties.

(*a*) See stat. 8 & 9 Vict. c. 16, ss. 14, 15.

Convenience requires that the transfer which is to be kept by the Company and registered by them should be a simple conveyance of the legal title, merely showing who is shareholder.

(WIGHTMAN, J., was absent.)

ERLE, J.—I am of the same opinion. This Act provides in the usual way for the transfer of shares. I am clear that "transfer" includes every conveyance by the voluntary act of the party, whether for money or for any other cause; and that the Act contemplates that such a transfer shall be by a deed giving the Company notice who goes out as a shareholder, who comes in, and who is in future to be liable for calls. A mortgage is a transfer; and the contents of the deed effectuating it ought to be what I have stated. The subsequent section provides as to transmissions by marriage, death, or "by any other legal means than by a transfer and conveyance." That section would apply to a transfer by bankruptcy, but excludes transfers by the intentional act of the party. In such cases no deed is to be left, but only an affidavit. I see nothing in the Act to entitle the applicant to have his mortgage registered as a mortgage, or in any other way than as a transfer.

CROMPTON, J.—We decided in Copeland *v.* North Eastern Railway Company, antè, p. 277, on the construction of *the clauses as to transfer and transmission in The Companies Clauses Consolidation Act, 1845, which are in language very similar to the clauses in this Act. I am clearly of opinion that the first provision in this Act applies to all cases where the transfer is by the act of the parties; in such cases it is to be by a deed, to be left with the clerk. The second provision applies where the transfer is by operation of law, as on death, marriage, or bankruptcy. On such devolutions an affidavit only is required. That being so, the only remaining question is, whether the deed in this case is "to the like effect" with the form given in the Act. I do not think it is at all like it. It appears to contain no agreement to make the purchaser liable to pay calls. It is also a deed embracing other property; and it would not be convenient for the mortgagee to leave it with the clerk. The Act did not intend to cast upon the Company the duty of construing complicated deeds, or of keeping title deeds of property in which they have no concern. I come therefore to the conclusion that this is not a deed to the like effect with the statutable form, and that the Company were not bound to keep and register it. I believe the practice has always been to have simple transfers, and separate declarations of trust. That practice is in conformity with our decision.

[*420

Rule discharged.

EASTER TERM, 1856.

REGULA GENERALIS.

The following rule was read in Court (Thursday, May 8th) in this Term.

It is ordered, that in lieu of Rule 164(*a*) of the Practice Rules of Hilary Term, 1853, the following be substituted. Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall be made before seven o'clock P. M., except on Saturdays, when it shall be made before two o'clock P. M. If made after seven o'clock P. M., on any day except Saturday, the service shall be deemed as made on the following day. And if made after two P. M. on Saturday, the service shall be deemed as made on the following Monday.

CAMPBELL,
JOHN JERVIS,
C. CRESSWELL,
W. ERLE,
CHARLES CROMPTON,
R. B. CROWDER,
J. WILLES,
FRED. POLLOCK,
E. H. ALDERSON
SAMUEL MARTIN,
G. BRAMWELL.

(*a*) 1 E. & B. xxvi. (E. C. L. R. vol. 72).

END OF EASTER TERM

CASES

ARGUED AND DETERMINED

IN

Easter Vacation,

XIX. VICTORIA. 1856.

The Court of Queen's Bench did not sit in Banc in this Vacation.

IN THE EXCHEQUER CHAMBER.

ALEXANDER RALLI, PANDIA THEODORE RALLI, and SPIRIDION MAVROJANNI *v.* ALFRED JANSON. *May* 9.

Held, by the Exchequer Chamber, reversing the judgment of Q. B., that, where memorandum goods of the same species, shipped in packages, are insured, and it is not expressed, by distinct valuation or otherwise, in the policy, that the packages are separately insured, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only (not being general average), if there be no stranding, though one or more entire package or packages be entirely destroyed, or otherwise totally lost, by the specified perils.

THE following case was stated without pleadings.

"The action was brought to recover a total loss on the interest which attaches to the defendant's subscriptions, of 250*l.* each, to two policies of insurance, at and from Calcutta to London, in respect of the number of *bags of linseed hereinafter mentioned. One of the policies was effected on the 6th October, 1851, and is as follows." The case then set forth the policy at length. [*423

It was for 3000*l.*, from Calcutta to London, upon "any kind of goods and merchandises" in "any ship or ships" "valued at ." The memorandum as to average was as follows. "N. B. Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under 3*l.* per cent., unless general, or the ship be stranded. On sundries to pay average as customary. Hides warranted free from particular average loss, unless the ship be stranded, sunk, or burnt, but to pay the charges of washing and dyeing if damaged by sea water. To follow insurance for 3000*l.*, dated 22d September." The policy contained stipulations for return of premiums, amongst others, "19*s.* per cent. for interest in sugar, and 57*s.* per cent. for interest in indigo, lac dye, silk piece goods, hides, and similar goods." There were also some warranties not material to the question

discussed. In all other respects the policy was in the ordinary printed form.

The second policy was also set out; it was dated 21st October, and was for 6000*l.* It was "to follow insurance for 3000*l.*, dated 6th October." In all other respects it was similar to the first. The case then proceeded. "The defendant subscribed each of these policies for 250*l.* The second policy was to follow and succeed the first policy. On the 18th October, 1851, 2225*l.* had been declared on the first-mentioned policy in respect of goods to which the present question has no reference. This left 775*l.* still to be declared on the first policy. *On the 18th November, 1851, the following declaration was endorsed on the first-mentioned policy.

*424]

Declaration per Allan as per previous policy				£4010
			Declared thereon	1785
			Remainder to this policy	£2225

13th November, 1851.

per Mary	R. C.	706	800 bags sugar	£1900
	R.C.	94		
per Successor	R.M.	400	ditto	950
per Waban	R.M.	c 2688	bags linseed	1600
per Florida	R.M.	1329	rapeseed	600
per Commonwealth	R. S.	859	ditto	400
				£5450
			Attaching to this policy	775
				£3000

The following declaration of interest was endorsed on the second policy.

18th November, 1851.

per Mary	Sugar	£1900
per Successor	Sugar	950
per Waban	Linseed	1600
per Florida	Rapeseed	600
per Commonwealth	Ditto	400
	Valued	£5450
See marks on previous policy declared thereon		775
Remainder to this policy 18th November, 1851.		£4675

*Subsequent declarations were made on the second policy to the full amount. [*425

In the month of August, 1852, a return of premium as to the whole of the 3000*l.* and 6000*l.* was paid by the underwriters to the plaintiffs, at the rate of 57*s.* per cent., on the ground of all the interest declared being free of particular average.(*a*) The linseed, insured and stated in these valuations or declarations, was packed in 2688 bags, which were shipped at Calcutta for London. The plaintiffs were interested in the linseed. The ship Waban sailed from Calcutta, with the 2688 bags of linseed on board, on the 5th day of December, 1851, for London. The linseed was packed in separate bags, each being of the same size and containing the same quantity. In the course of the voyage the ship met with a hurricane and very heavy gales of wind, and was struck with seas, from which she sustained much damage, and sprung a-leak, and was in great distress. A part of the cargo was thrown overboard to lighten the ship; and amongst other goods so thrown over were 505 bags of the linseed insured by the above policies. The ship ultimately bore up for the Cape of Good Hope, and arrived there in a very damaged state; and a large part of the cargo was there discharged. Of the 2688 bags so shipped, 1023 bags were in such a state from sea damage that a large portion of the said linseed was thrown into the sea as totally rotten and worthless, and the rest was sold and only realized a few shillings, and, if sent on in the vessel, *would have lost the character of linseed before arrival in England. The remaining [*426 1160 bags were brought sound to England, and delivered to the plaintiffs. The proportion payable by the defendant for the general average has been paid by him to the plaintiffs. No notice of abandonment was ever given to the defendant. The ship was not stranded during the voyage. The plaintiffs claim a total loss upon each of the 1023 bags.

If the Court shall be of opinion that they are entitled to a total loss, the amount payable by the defendant will be 8*l.* 12*s.* 11*d.* on the first policy, and 26*l.* 1*s.* upon the second policy; and judgment is to be signed accordingly for the plaintiffs.

If the Court should be of opinion that the plaintiffs are not entitled to recover such total loss, judgment of non pros is to be entered for the defendant."

This case had been originally stated in an action of Ralli *v.* Davis, between the same plaintiffs and another underwriter on the same policies. It came on for argument in the Queen's Bench, in Hilary Term (January 17th), 1854; *Tomlinson* appearing for the plaintiffs, and *J. P. Wilde* for the defendant: when the Court(*b*) stated that the opinion

(*a*) By a memorandum on the policies, "interest declared on sugar" was to be free from average, to return premium "as for indigo, &c.;" but indigo, and the other articles on which, by the policy, there were to be returns were not all free of average. No reference was made during the argument to this statement, which could not affect the construction of the policy.

(*b*) Lord Campbell, C. J., Coleridge and Wightman, Js.

commonly received, since Davy *v.* Milford, 15 East, 559, that an insurance on goods in packages was to be construed as insurance on each package, could not be overturned unless in a court of error, and gave judgment for the plaintiffs, recommending that the case should be turned into a special verdict. On the passing of The Common Law Procedure Act, 1854, the plaintiffs discontinued that action, and stated the same
*427] case in the present action. Judgment was, by *consent, given in the Queen's Bench for the plaintiffs, without argument; and the defendant appealed.

The case was argued in the Exchequer Chamber in Michaelmas Term, 1855 (November 15th),(*a*) by *Wilde* for the appellant, the defendant below, and *Tomlinson* for the respondents, plaintiffs below. The authorities and arguments are so fully noticed in the judgment as to render any further report unnecessary. *Cur. adv. vult.*

Jervis, C. J., in this vacation (May 9th), delivered judgment.

This action was upon two policies of insurance, upon goods in respect of a total loss of 1023 bags of linseed, part of a larger quantity, shipped on board The Waban for a voyage from Calcutta to London.

The first policy was effected, on the 6th of October, 1851, for 3000*l.*, upon goods insured, by order of the plaintiffs, from Calcutta to London, by ship or ships. It contained the usual memorandum, by which, inter alia, seed was "warranted free from average, unless general, or the ship be stranded."

The second policy was to the like effect, for 6000*l.*, "to follow insurance for 3000*l.*"

The linseed, of which that in question formed part, consisted of 2688 bags shipped on board the Waban for the voyage insured. It was declared and endorsed upon the first policy as follows, viz., "per Waban, [R. M.] c 2688 bags linseed 1600*l.*," and upon the second policy as follows, "per Waban, linseed 1600*l.*" The vessel, upon her voyage, met with a hurricane, in the course of which 505 bags of the linseed, as to which
*428] no question arises, *were thrown into the sea to lighten the vessel; and she was ultimately driven into the Cape of Good Hope, where 1023 bags were found to be in such a state from sea damage that a large portion of the linseed in them was thrown into the sea as rotten and worthless, and the rest was sold, and only realized a few shillings, and, if sent on in the vessel, would have lost the character of linseed before arrival in England.

It is in respect of those 1023 bags that the question arises, the remaining 1160 having been brought sound to England, and delivered to the plaintiffs.

The plaintiffs below contend that they are entitled to recover in respect of this loss, notwithstanding the terms of the memorandum, on

(*a*) Before Jervis, C. J., Pollock, C. B., Crowder and Willes, Js., and Parke, Platt, Alderson, and Martin, Bs.

the ground that this was not in its nature an average but a total loss. It was not denied that, if the linseed had been shipped in bulk, and an equal or even greater portion of it had been lost in a similar way, the warranty would have exempted the underwriters from liability. This is now too clear to admit of any serious doubt. But it was said, that the fact that the cargo was shipped in bags made a difference, and that, by reason of the shipment having been in that form, the warranty must be held to apply, not to the whole cargo as in the case of a shipment in bulk, but to each bag as being a distinct object capable of separate insurance and valuation, and that, as 1023 entire bags had been lost, there was a total loss of each of those portions of the cargo; and the warranty against particular average consequently inapplicable. If this proposition be sustainable, that the warranty is upon each bag and not upon the cargo consisting of all the bags, either upon the natural construction of the memorandum, or in any sense in which it has been construed *by former decisions binding upon us, the plaintiffs are [*429 entitled to recover.

As to its natural construction, there is no difficulty. The memorandum was introduced for the protection of the underwriters against partial losses of the subject-matter insured. It is framed in general terms, and must therefore, according to the well known rule of construction, be applied to the whole of each subject-matter falling within its terms, except such construction be limited or controlled by reference to other parts of the policy. Thus, in the particular case of seed, the warranty applies in terms to all seed loaded on board the vessel, without restriction to seed loaded in bulk or in any particular manner, unless it appear by the terms of the policy, as for instance by separate valuation, that it was intended to distinguish one portion of the seed from another, and to make a separate insurance upon each portion as well as a joint one upon all. There is, for this purpose, no difference in point of reason between the total loss, by the same perils, of part of a cargo loaded in bulk and part of the same cargo loaded in bags, each being equally a total loss of a part but equally a partial loss of the whole. The fact of the cargo being in bags only renders it more practicable to value and insure each bag-full separately: but, in the absence of a separate valuation, or other similar expression, to indicate an intention to insure each package severally as well as the whole jointly, it does not of itself show that the policy, which is in terms upon the whole, was intended to apply severally to each particular bag, any more than it would apply to each separate particle of a cargo loaded in bulk.

If the case were free of authority, therefore, we should *have [*430 felt no difficulty in holding that the memorandum applies to the whole of each species of which the cargo consists, whether in bulk or in packages, unless the packages be separately valued or otherwise separately insured, which, in the present case, they are not. The

plaintiffs below, however, insist that it has been established by authority, and is settled law in this country, that, if a cargo of perishable goods, warranted free of particular average, be made up of several packages, each capable of a distinct valuation, and any one package of these be entirely lost, there is a total loss of such package, for which the underwriters are liable, notwithstanding the warranty, and though all the rest of the cargo arrive in safety.

We proceed to consider the authorities which are said to establish this proposition.

In Lewis *v.* Rucker, 2 Burr. 1167, the sugar was warranted free from average under 5 per cent. It was shipped in hogsheads, and valued at 30*l.* per hogshead, the clayed sugars, and 20*l.* per hogshead the muscovado sugars, and it was damaged to the extent of more than 5 per cent. The passage in the judgment of the Court, relied upon by the plaintiffs, related only to the question whether, upon a total loss of ten hogsheads, separately valued, the value in the policy was to be taken as the amount to be paid, or whether regard was to be had to the price for which the rest of the cargo might be sold. From the very nature of the case, therefore, Lord Mansfield could not have intended to express an opinion that the loss of ten hogsheads only, not separately valued, and without anything in the policy to indicate that they were meant to be separately insured, would fall upon the underwriters. *The case of Lewis *v.* Rucker turned entirely upon the principle by which the amount payable by the underwriters was to be ascertained; and the case has no bearing upon the present question.

*431]

The case of Davy *v.* Milford (E. 1812), 15 East, 559, which was principally relied upon by the plaintiffs below, has been much misunderstood. It was an insurance at and from London to Exeter, upon flax "warranted free of particular average." The flax was packed in twenty-four separate mats, weighing in all between 5 and 6 tons. The vessel was wrecked off Rye, about half a mile from the shore; part of the flax floated on shore in a loose state out of its packages, and was mixed with a little sand, and injured; and other part of it was afterwards gotten out of the bottom of the sunken vessel, at different times and was brought on shore. The whole quantity saved was about a ton making more than one-sixth of the whole. No entire package came on shore. What did come on shore was loose and wet; and, as flax was a perishable commodity, it was necessary to sell it; and it was accordingly sold on the spot, and realized net 2¾ per cent. upon the sum at which the whole was valued. No notice of abandonment was given. It does not appear from the report that any one of the mats of flax was entirely lost. Under these circumstances the plaintiff sought to recover as for a total loss of all, whilst the defendant insisted upon there having been no notice of abandonment, and also upon the warranty against particular average. The point actually decided in Davy *v.* Milford, 15 East,

559, is expressed with tolerable correctness in the marginal note as follows: that *"upon a policy of insurance on flax, valued at so much, and warranted free of particular average, if the vessel be wrecked, and the assured do not abandon, but labours to save the cargo, and in fact saves a part (1–16th), though much damaged, they are entitled to recover as for a total loss of that part which was in fact totally lost, but not for the rest which was saved to them in specie, though deteriorated." That this note correctly expresses the opinion of the Court, and that their decision in no respect turned upon the fact of the flax having been shipped in separate mats, distinctly appears from the language of the judgment,(*a*) viz., "no case has been cited to show that where the least particle of the thing insured subsists in specie, though the greater part is actually destroyed, the assured shall be precluded from recovering the value of that which was in fact totally lost." And, again, "the plaintiffs are entitled to recover, as for a total loss, the value of that part which was in fact totally lost; and that they are not entitled to recover for that part which was not totally lost, but still continued to subsist in specie, though deteriorated in value." This judgment was in truth a mere application of what Lord Ellenborough had stated to be his opinion in the course of the argument (page 563), viz., "that the policy was to be construed *devisè;* that is, that as to the part which was not saved from the wreck, there was a total loss; and as to that which was saved, but damaged, it was a partial loss." Far from holding that the fact of the flax being packed in separate mats was important, the Court decided that in respect of *all* the flax that was lost the plaintiffs were entitled to recover, without expressing *any regard to whether that which was saved formed part of the same package or packages with all or a portion of that which was lost. This latter question would obviously have been material if the insurance, though in terms general "upon flax," had been treated by the Court as in effect several upon each separate mat; because some of that which was lost must have formed a portion of the same mats with portions of the one ton which was saved; and, if the insurance had been upon each separate mat, then, inasmuch as portions of some if not all of the mats were saved, the plaintiffs could not have been held entitled to recover in respect of *all* the flax that was lost. The Court, therefore, in construing the policy "*devisè*," did so, not as to each separate package, but as to each portion of the cargo, considered as one entire bulk of flax; and their decision was intended to be, and was, that the warranty "free of particular average" did not extend to the case of total loss of a part of the subject-matter insured, which had sunk to the bottom of the sea, and thereby ceased to exist; a proposition which, as applicable to the case of a shipment in bulk, is admitted not to be maintainable,

[*432

[*433

(*a*) 15 East, 556.

and is in direct variance with the later decisions to be presently mentioned, and with which we agree.

In Hedburg *v.* Pearson (in 1816), 7 Taunt. 154 (E. C. L. R. vol. 2), S. C., 2 Marshall, 432 (E. C. L. R. vol. 4), the insurance was "on hogsheads of sugar" warranted free of particular average; and all but a small portion of the sugar in each of the hogsheads was washed out and entirely lost, the part saved amounting to only 3 per cent. upon the whole cargo; and the Court held that the loss was within the war-
*434] ranty, and the assured were not entitled *to recover. The Court are reported in 7 Taunton to have said, that in Davy *v.* Milford, 15 East, 559, there was a clear line to be taken; for *some of the bundles of flax never came ashore.* With respect to this supposed distinction between the two cases, it is not founded upon any fact stated in the report of Davy *v.* Milford. It does not appear that the flax which came on shore belonged to any particular bundle or bundles; and, from its quantity, it must have consisted of parts of several, if not all, the mats. Further, the plaintiffs in that case, as already observed, recovered not in respect of one or more mats, no part of which came ashore, but for all the flax that did not come ashore, without regard to whether it formed a portion of the same mat or mats with that which was saved. According to the report of Hedburg *v.* Pearson, in 2 Marshall, 433, Gibbs, C. J., said, "The case of Davy *v.* Milford differs from the present; because *here*, each hogshead had *some* sugar saved in it, though but little. If any of the hogsheads had been entirely lost, it would have been a total loss as to them; but as it is, I do not see where we could stop, or how draw the line." This dictum of the Lord Chief Justice is the only distinct trace we find in the reports of any distinction supposed between the effect of the warranty against particular average as to a cargo in bulk, and as to a cargo of the same commodity in separate packages not separately valued. It was only a statement of what Gibbs, C. J., supposed to have been decided by the Court of Queen's Bench in the case of Davy *v.* Milford; and, as it was founded upon a misappre-
*435] hension of that case, it is not entitled to the respect *which an independent opinion, though extrajudicial, might have commanded.

In Cologan *v.* The London Assurance Company (M. 1816), 5 M. & S. 447, 585 bushels, being part of a cargo of wheat insured under the description of "3224 bushels of wheat," with a warranty against average unless general, were so damaged by sea water that they were, by order of magistrates for the sake of the public health, thrown overboard and lost. It was argued on behalf of the plaintiff that here, at all events, was a total loss of part, for which he was entitled to recover; to which it was answered for the underwriters, "is not this rather a partial loss of the whole than a total loss of a part?" (which might have been better put thus: "is not a total loss of part, ex vi terminorum, a

partial loss of the whole?") It became unnecessary to decide the question, the plaintiff having been held entitled to recover upon other grounds as for a total loss of the whole cargo; and no opinion was expressed upon it by Lord Ellenborough or Bayley, J.: but Abbott, J., said that he strongly inclined to the conclusion that this was "a total loss of part;" and Holroyd, J., stated the inclination of his opinion to be that, "after part of the whole cargo was thrown overboard, there was a total loss by perils of the seas of that part." Assuming that those learned Judges meant to say, not only that there was a total loss by perils of the seas within the meaning of the policy, notwithstanding the actual existence of the corn, though in the form of a nuisance at the time it was thrown overboard (as to the correctness of which no doubt can now be entertained), but also that the value of such part might be recovered, notwithstanding *the warranty against [*436 particular average, their opinion was to the same effect as Davy *v.* Milford, 15 East, 559, namely, that the warranty does not include the case of a total loss of part, involving the total destruction of that part by its sinking to the bottom of the sea. The case itself was one of shipment in bulk: and, though the corn was described as "3224 bushels of wheat," that was a mere description of the quantity of the bulk, and had not the effect of making the insurance distributive as to each bushel. The opinions of the two learned Judges in that case do not point to the existence of any distinction between shipment in bulk and in packages. They stand upon the same ground as Davy *v.* Milford.

In Hills *v.* The London Assurance Corporation (M. 1839), 5 M. & W. 569,† the insurance was upon wheat valued at 1600*l.*, and warranted free from average except general, or the ship should be stranded. The wheat was shipped in bulk; and during bad weather, which caused the vessel to make water and rendered the use of the pumps necessary, 75*l.* worth of the wheat was pumped out with the water, and wholly lost. The Court of Exchequer held that the underwriters were protected from liability by the warranty. In the report of this case in Meeson & Welsby, Lord Abinger is made to give an account of Davy *v.* Milford wholly at variance with the facts of that case, but which answers to Lewis *v.* Rucker, 2 Burr. 1167 (not, as suggested by Mr. Phillips in his very able work 2 Phillips on Insurance, 459 n. 2, to Hedburg *v.* Pearson, 7 Taunt. 154 (E. C. L. R. vol. 2). The case referred to by Lord Abinger was one in which "each hogshead was separately valued and insured; and therefore a loss of one was properly held to be a total loss of that hogshead." *This identifies the case of which [*437 Lord Abinger was speaking as Lewis *v.* Rucker, in which there was a separate valuation of each hogshead, whilst in Hedburg *v.* Pearson the insurance was upon "hogsheads of sugar," generally, without any separate valuation of each hogshead. That Lewis *v.* Rucker was the case referred to by Lord Abinger appears still more clearly upon

reference to the contemporaneous report of Hills *v.* The London Assurance Corporation, 9 L. J. N. S. Exch. 27, where Lord Abinger is reported as having referred to the case in Burrow's Reports, and not to that of Davy *v.* Milford. This correction makes the judgment consistent, so far as it touches the question whether shipment in packages makes any difference in the liability of the underwriter. The following passage in the judgment, as reported in 5 M. & W., is material, viz.: "where the insurance is upon each package separately" (not merely where the cargo is shipped in packages, but "*where the insurance*," as in Lewis *v.* Rucker, "*is upon each package separately*,") "it is to be treated as a total loss upon each package lost; but when it is an insurance upon the bulk, unless the loss exceed a certain value upon the particular article, there is no average loss; and there cannot in such a case be any total loss of a portion only of the cargo." This judgment of the Court of Exchequer lends no countenance to the doctrine asserted by the plaintiffs, that the entire loss of a part of a cargo of the same description of goods may be partial or total, according to whether the cargo was shipped in bulk or in separate packages; and, if the latter, whether the amount lost consisted of part only of each and every, *some or one, or of the whole, of one or more of such packages.

*438]

In Navone *v.* Haddon (H. 1850), 9 Com. B. 30 (E. C. L. R. vol. 67), the insurance was upon 81 bales of waste silk, valued at 2245*l.*, and warranted free of particular average unless the ship should be stranded, upon a voyage from Genoa to Leghorn, and thence to Liverpool. The vessel was forced by stress of weather to put into Gibraltar to repair; and some of the bales of silk were found to be so damaged by the sea water that the master, in the exercise of a reasonable discretion, such as a prudent owner uninsured would have exercised, sold them on the spot. They might, however, at a reasonable expense, have been put in a condition to be brought to Liverpool in another vessel. The Lord Chief Justice (Lord Truro), in giving judgment, said that "no one of the bales was so damaged as to make the whole contents useless for any mercantile purpose. There was, therefore, no entire loss of any one bale." And, again, "the facts found, are, that the silk in question was only partially damaged, that no one package was so injured as in the result to lead to its entire destruction, but that the whole might have been sent forward, as silk, in a reasonable time, and at a reasonable expense." These expressions are relied upon to show that, in Lord Truro's opinion, if any one bale had been wholly destroyed, the assured might have recovered.(*a*) We do not however understand them in that sense; the Lord Chief Justice was speaking with reference to

(*a*) In the course of the argument in the case in the text, *Wilde* produced the policy in Navone *v.* Haddon, by which it appeared that each bale was separately valued. This fact is not noticed in the report of that case.

the facts before him, and used the fact that no one package was entirely destroyed *to show that not only was the plaintiff not entitled to recover, but that there was nothing to raise any serious question [*439 of liability, such as the present discussion shows might have arisen if any one of the bales of silk had been wholly destroyed. It has also been said that, in the course of the argument in Navone *v.* Haddon, Cresswell, J., recognised Davy *v.* Milford, 15 East, 559, as good law. This however was erroneous, because the learned Judge cited Davy *v.* Milford as an authority only to show that the plaintiff, in Navone *v.* Haddon, could not recover in respect of what was saved in specie though deteriorated, as to which point the decision in Davy *v.* Milford has not been questioned. The same remark applies to the citation of Davy *v.* Milford by Dampier, J., in Glennie *v.* The London Assurance Company, 2 M. & S. 371, 376 (E. C. L. R. vol. 28), for the purpose of showing that the warranty against particular average exempted the underwriters from liability in respect of a cargo of rice so damaged that it did not produce sufficient to pay the freight.

Mr. Stevens's work On Average was also referred to by the plaintiff below: but, so far as it can be considered an authority, it is against the existence of any distinction for this purpose between a shipment in bulk and a shipment in separate packages. At pages 224 and 225 (5th ed.) the author states it to have been the practice to insert in the policy an express clause, "to pay average on each package," "as if separate interests, separately insured," or "to pay average on each ten, fifteen, twenty hogsheads (as the agreement may be), succeeding numbers as if, &c.;" and he proceeds to say, "it is now, indeed, considered so much agreeable to usage, where goods are insured direct *from the [*440 place of growth or manufacture, that if the clauses, 'to pay average on each species' of produce, or 'on each package' of manufactured goods are not inserted, yet a liberal construction is put upon the omission, and the policy is acted on as if they were. The reason is this,—that no objection would have been made to it when the insurance was effected, and, in consequence, it is considered in practice, as a mere verbal omission of the broker, and, treated as such:—agreeably to the opinion of Magens" (74), "who says,—'in an insurance made generally on goods, each different parcel or kind of goods ought to be considered by itself.'" This statement of the author shows that it was the practice in certain cases only to insert express words to bind the underwriters to pay in respect of each package, and that their omission was in such cases only, not universally, treated as a mistake, and the policy acted upon as if it had contained them. So far indeed is the author from suggesting that the policy without such words would in point of law bind the underwriters as to each package, that in the note to page 224 he states a doubt of Magens, "if 101 chests of goods be insured and three chests be totally damaged, so as to be worth nothing,

whether the loss can be claimed of the underwriters," and goes on to say, "Strictly speaking it cannot, and it is to obviate this difficulty that the above clauses are by his recommendation introduced into the policy." So that the opinion of the author is against the claim of the plaintiffs below founded upon the shipment having been in bags, in the absence of an express separate insurance of each bag. At page 233, however, he states two points to be settled, viz.: "That when goods are warranted free of average, the underwriters are liable to pay a total loss of *a part, or a partial loss of the whole, if part of the thing insured go in bulk to the bottom of the sea: or, if it be rendered totally worthless, though it subsist in specie, and,—that (with the same warranty), they are not liable to pay a partial loss, though it be in fact a total loss of a part, if that loss be the consequence of sea-damage." For the first of these points, he refers only to the case of Davy *v.* Milford, 15 East, 559; and it is remarkable that in this part of the work he is speaking without reference to any distinction between a shipment in bulk or in packages. At page 237, the same author says that, "where there is a total loss of a part in bulk, whether it goes to the bottom of the sea by accident, or whether by being rendered worthless it is thrown into the sea, or remain on land, the underwriters are liable; though the article be insured 'free of particular average.'" The authorities referred to for this position are, the judgments of Lord Alvanley in Dyson *v.* Rowcroft, 3 B. & P. 474, and of Lord Ellenborough and Abbott, J., in Cologan *v.* The London Assurance Company, 5 M. & S. 447. In both those cases, however, the goods were, for aught that appears, shipped in *bulk*, and the loss was held to be total of the entire cargo; and both Lord Alvanley and Lord Ellenborough confined their judgments to that view of the case; whilst the extrajudicial dictum of Abbott, J., as already observed, was to the same effect as Davy *v.* Milford. This statement of Mr. Stevens upon this point, therefore, must stand or fall with that case.

*441]

There remains to be noticed the learned work of Mr. Arnould, in which (page 1038) the law is laid down as contended for by the plaintiffs below; but, whilst we fully *recognise the merit of that work as a compilation, we cannot treat it as establishing a proposition not borne out by the authorities referred to by the learned author, all of which we have examined for ourselves.

*442]

It appears, upon this review of the authorities, that the judgment in Davy *v.* Milford did not proceed upon the fact of the goods having been shipped in packages, and, indeed, that it could not be sustained upon that ground. It was not put upon the ground that the flax saved could not have been brought in the state of flax to its destination, because, in that case, the plaintiff ought to have recovered for a total loss, with benefit of salvage to the underwriters. It is at variance with the plain meaning of the memorandum, and with numerous authorities from which

attempts have been made to distinguish it (amongst others Hills *v.* The London Assurance Company, 5 M. & W. 569†): and so far as the judgment was against the underwriters it must now be considered as overruled. The same of the dicta of Abbott, J., and Holroyd, J., in Cologan *v.* The London Assurance Company, 2 M. & S. 447 (E. C. L. R. vol. 28). The same of the dictum of Gibbs, C. J., in Hedburg *v.* Pearson, 7 Taunt. 154 (E. C. L. R. vol. 2), which arose from a misapprehension of Davy *v.* Milford. The citations of Davy *v.* Milford by Dampier, J., in Glennie *v.* The London Assurance Company, 2 M. & S. 371, and by Cresswell, J., in Navone *v.* Haddon, 9 C. B. 30 (E. C. L. R. vol. 67), were for the purpose of showing that the plaintiffs in those cases could not recover in respect of what remained in specie, and they add nothing to its supposed authority as to the right to recover for the part that was lost. The supposed reference to Davy *v. Milford by Lord Abinger in Hills *v.* The London Assurance Company appears to have been a mistake of the reporter. [*443

These remarks upon the cases cited dispose also of the statements in the text books founded upon them; and it appears in the result that there is no authority binding us to construe the memorandum in any sense different from the ordinary meaning of the words.

We have looked into the works of foreign writers, to ascertain whether there was anything in the general maritime law to guide us in our judgment.

In Valin, Commentaire sur l'Ordonnance de la Marine du mois d'Août, 1681, liv. iii. tit. vi., des Assurances, art. 47 (vol. 2, p. 113), and Émérigon, Traité Des Assurances, chapitre 12, sections 45, 46 (2d volume of the edition by Boulay-Paty, pages 8 to 20), the history and effect of the warranty "free of particular average" are stated and discussed. It appears that a similar clause was in use in Italy as early as the 16th century, and that it was confined in construction, by the Italian lawyers, to cases of trifling and inconsiderable jettison, or damage in usual and ordinary events. Valin, in his commentary, objects to the general introduction of such a clause on the ground of its tendency to abuse, because of giving the captain an interest in the destruction of the vessel by stranding; and that notion, at one time, prevailed to such an extent that the Court of Admiralty at Marseilles, in 1718, exceeded its jurisdiction so far as to make an ordonnance (shortly afterwards annulled by the Parliament of Aix) prohibiting the introduction of the clause into policies under a heavy penalty. The opposite view, however, ultimately prevailed. Pothier (Du Contrat d'Assurance, No. 163), *Émérigon (ubi suprà), and Boulay-Paty in his commentary on Émérigon (2 Émérigon, 14), show it to have been settled in France, long before the Code de Commerce (see s. 409), that the clause "free from average" was valid, and exempted the underwriters from all average loss, whether general or particular, except in cases of [*444

total loss of the whole, either actual or constructive. We find no trace, throughout the discussions of the subject by those great lawyers, of a distinction as to the mode in which the cargo is packed. The diversities of opinion expressed by them relate to the validity of the clause, and the extent and character of the loss which should be considered as falling within its terms, and not, in any respect, to the circumstance of shipment in bulk or in packages. Indeed, in one of the cases (*a*) reported by Émérigon, chapter 12, section 46 (2 Émérigon, by Boulay-Paty, 18), the cargo consisted of soap in boxes, and the assured were held not to be entitled to recover in respect of a jettison (in the nature of general average) of 200 boxes. Under the circumstances of that case, the assured in an English policy, with the ordinary memorandum, would have been entitled to recover, either on the ground that it was a general average loss or that the ship was stranded. That, however, would only be in consequence of the express exceptions of general average and stranding in the English form; and the case is in point to show that the clause "free of average" was considered by Émérigon to apply to the whole cargo, though shipped in separate packages.

In America the point has been much considered: and it appears, from the authorities cited in argument,(*b*) to be *there held that the *445] form of shipment, whether in bulk or in separate packages, makes no difference in the liability of the underwriters; and that the assured has no claim on account either of a partial destruction of the value of the article, or a destruction of a part of the article, whether it be shipped in bulk or in separate packages, unless the policy indicate that a loss is to be adjusted on each package; in other words, unless each package is separately valued and insured.

It was said, by the learned counsel for the plaintiffs below, that the authority of the foreign decisions, on this subject, was weakened by the fact that, in other countries, abandonment is permitted to the assured in cases where the average bears a large proportion (now in France 75 per cent.; Code de Commerce, 369, Dictionnaire du Contentieux Commercial, tit. *Délaissement*, n. 45: in America 50 per cent.; Phillips, sect. 1536 (vol. 2, p. 271, 3d ed.)) to the entire value of the subject insured. These provisions, no doubt, give a wider application to the doctrine of constructive total loss and abandonment, and increase the liability of underwriters, by enlarging the number of cases in which the loss is considered total; but, with respect to those cases in which the loss is partial, the construction to be put upon the language of the memorandum ought to be everywhere one and the same. All considerations of hardship are excluded by the nature of the question, What is the true construction of the contract which the parties have entered

(*a*) The case of Le Furet, 2 Emérigon, 18.

(*b*) The authorities cited were those collected in Phillips On Insurance, s. 1773, vol. 2, p. 459, 3d edit.

into? Is this a case in which the underwriters have contracted to be liable or have stipulated to be exempt? Moreover, we refer to the foreign authorities, only to show that there is nothing in the general law merchant to sanction the proposition contended for by the plaintiffs below, or in any way inconsistent with the result at which we have arrived.

*It was suggested, during the course of the argument, that there was some usage of trade affecting the question: but no such usage is stated in the case to exist in point of fact; and we need not consider how far such a usage, if it existed in fact, could control the terms of the policy. [*446

We have not lost sight of the argument of the defendant below, that, although the policy is upon a voyage in "ship or ships," it expresses, within its four corners, the entire contract between the parties: that the subsequent declaration of interest was merely the act of the assured in the exercise of a power conferred upon them, and that they could not thereby alter the effect of the policy. We need not, however, further notice this argument, because, assuming in favour of the assured that each of the policies had contained the words in which the interest was declared upon the first, viz.: "per Waban [R. M.] c 2688 bags linseed 1600*l.*," in our judgment the result ought to be the same.

We are of opinion that, where memorandum goods of the same species are shipped, whether in bulk or in packages, not expressed by distinct valuation or otherwise in the policy to be separately insured, and there is no general average, and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire package or packages, and though such package or packages be entirely destroyed or otherwise lost by the specified perils. As to their liability in respect of different species we need not express any opinion.

For these reasons we reverse the judgment of the Court of Queen's Bench, and give judgment for the defendants below.

Judgment for the defendants.

A policy of insurance was executed to the amount of $5200 on 104 bales of cotton, valued at $50 per bale, shipped at Savannah for Philadelphia, freight to be 75 cents per bale with primage and average accustomed: in the policy it was stipulated that "no loss or average shall in any case be paid under five per cent. unless general." On the voyage, during a storm, four bales of the cotton were washed overboard, and an action of covenant for their insured value was brought: held, that the percentage was to be counted on the whole value of the cotton insured, and not on each bale separately, and that there could be no recovery for a loss or damage under five per cent. unless it happened by way of general average: Newlin *v.* Ins. Co., 20 Penna. State Rep. 312.

*447] *IN THE EXCHEQUER CHAMBER.

(In Error from the Queen's Bench.)

CHARLES HENRY COOPER *v.* FREDERICK WILLIAM SLADE. *May* 9.

Two counts for penalties under The Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102): one for promising money to an elector to induce him to vote at an election; and the other for corruptly giving him money on account of having voted at the election. Plea: Not guilty, by statute. Verdict for plaintiff, subject to an exception that there was no evidence to go to the jury. On the bill of exceptions the evidence was set out: by which it appeared that defendant, S., was a candidate at a contested election for a borough, standing with M. A witness, T., gave evidence that he was in S. & M.'s committee room when there was a discussion about travelling expenses; that defendant's agent for election expenses asked defendant whether it would be legal to pay travelling expenses to bring up the outvoters; defendant answered it would be legal to pay what the voters paid out of pocket. Thereupon T. wrote to C., an outvoter, asking him to come up and vote for S. and M., adding, "your railway expenses will be paid." C. came, and voted for S. and M.; and his expenses were paid by the election auditor, on the voucher of defendant's election agent, written on T.'s letter.

Held, by the Exchequer Chamber, that a promise to pay travelling expenses, conditioned on the voter voting in a particular manner, was an offence within the Act, and that actual payment in pursuance of such a promise to pay was corrupt and an offence within the Act; but that payment of such expenses, without any such condition, was not illegal: and that there was in this case no evidence to go to the jury that the defendant authorized a promise to pay the expenses of those outvoters only who should vote for him. Venire de novo awarded. Williams, J., dissentiente, on the ground that there was some evidence of a promise conditioned on the voter voting in the particular manner.

This was a proceeding in error by the defendant on a bill of exceptions. The declaration contained a preliminary averment that, after the passing of the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), an election for two members was holden at Cambridge. It then contained seventy-nine counts. The seventh count was for a penalty, "for that defendant promised money to or for one Richard Carter," a voter, "in order to induce" him "to vote at the said election." The eighth count for a penalty, for that defendant "corruptly gave money to or for the said Richard Carter," then being a voter, "on account of the said Richard Carter having voted at the said election."

*448] *Plea: The general issue, by stat. 21 Jac. 1, c. 4, s. 4.

The verdict as to the 7th and 8th counts was for the plaintiff.

The bill of exceptions set forth that the cause came on for trial at the Cambridge Summer Assizes, 1855, before Parke, B. That it was proved that George Brimley was the election auditor for Cambridge for the year 1854; that the election of two members took place in August, 1854, and was duly held; that Viscount Maidstone and the defendant were two candidates on one side; that Samuel Peed was appointed the defendant's agent for election expenses; that Carter was a voter, who at the time of the election was at Huntingdon; that he received the following letter. "Cambridge Borough Election. Committee Room, Lion Hotel, August 12th, 1854. Sir, The Mayor having appointed

Wednesday next for the nomination, and Thursday for the polling, you are earnestly requested to return to Cambridge, and record your vote in favour of Lord Maidstone and F. W. Slade, Esq., Q. C. Yours truly, CHARLES BALLS, Chairman. Your railway expenses will be paid." This letter was a printed circular, with the exception of the words "Your railway expenses will be paid," which were in manuscript. Carter, in consequence, came to Cambridge, and voted for Maidstone and Slade. The auditor, Brimley, at the trial, produced the letter of August 12, with a memorandum written on it: "Allowed 8*s*. for expenses from Huntigdon, . WILLIAM THIRKETTLE;" and another, "I allow Mr. R. Carter's claim to have 8*s*. for travelling expenses, S. PEED;" and gave evidence that it was brought to him with only the first memorandum, and that he sent it back to have it vouched by Peed, and, on its being brought back with the memorandum signed *by Peed, he paid Carter 8*s*. out of the money deposited with him on account of the defendant. William Thirkettle was called [*449 as a witness for the plaintiff. His evidence was set out, in the bill of exceptions, as follows. The witness stated "that he was clerk to the said Samuel Peed at the said election in 1854; that there was a committee for conducting the election of Viscount Maidstone and Mr. Slade; that Charles Balls acted as chairman of such committee; that he, Thirkettle, saw Slade at the committee room, and had, in Slade's presence, heard the question of travelling expenses discussed; and that Slade said it was legal to pay travelling expenses to bring up the outvoters; that Slade gave his opinion, that such travelling expenses might be paid, for the guidance of Samuel Peed: that Peed asked Slade whether it would be legal to get up the outvoters and pay their legal travelling expenses, what they paid out of pocket: that he, Thirkettle, could not say whether Mr. Balls was there at the time; and that he, Thirkettle, wrote the words 'your railway expenses will be paid' at the bottom of the said letter above set out, after Slade had said that the payment of travelling expenses was legal. On cross-examination Thirkettle stated that, when the said question was put to Slade, a law book was sent for, and brought, and the opinion of Chief Justice Tindal read: and upon that Slade said 'I think the expenses are legal, and that nothing beyond legal expenses are to be paid:' and, on re-examination by the counsel for the plaintiff, Thirkettle stated that he thought that the words used by Slade were 'to pay merely the expenses out of pocket.' The counsel for the defendant did not offer any evidence on his behalf, but insisted" that, upon the *evidence so given, the defendant [*450 was entitled to a verdict on the 7th and 8th counts, "and prayed the said justice so to direct the jury: but the said justice did then and there declare and deliver his opinion to the jury aforesaid, that the said several matters so produced and given in evidence on the part of the said Charles Henry Cooper were sufficient, and ought to be left to the

jury for their consideration; and that, if the jury were satisfied, upon the evidence, that the defendant did, by himself or any other person on his behalf authorized by him so to do, promise money to the said Richard Carter in order to induce him to vote for the said defendant, that they should find the 7th count for the plaintiff, although the sum of money so promised was no more than the fair and reasonable expenses of Carter's travelling from Huntingdon to Cambridge, on the day of the election, and back again, after the election, to Huntingdon: And that, if the jury were satisfied upon the evidence that the defendant did, by himself or any other person on his behalf authorized by him so to do, give money to the said Richard Carter on account of, that is to say, that the moving cause of his giving such money was, the said Richard Carter's having voted for the defendant, that they should find the 8th count for the plaintiff, although the sum of money so given was no more than the fair and reasonable expenses of Carter's travelling from Huntingdon to Cambridge, on the day of the election, and back again, after the election, to Huntingdon, and although the said defendant honestly believed he was committing no offence thereby; and with that direction the said justice left the same to the jury. Whereupon the said counsel" for Slade excepted on the ground that there was no evidence.

*451] *The case was argued in the Vacation after last Hilary Term.(*a*)

Knowles, for the defendant below.—Stat. 17 & 18 Vict. c. 102, repeals all the previous Acts relating to bribery. By sect. 2 the doing of certain acts is defined to be bribery, and all persons so offending are declared guilty of a misdemeanour, and liable to forfeit the sum of one hundred pounds. Amongst those acts are enumerated giving or promising any money or valuable consideration to any voter, "in order to induce any voter to vote, or refrain from voting," or "corruptly" doing any such act on account of such voter having voted or refrained from voting. The two counts on which the verdict has been taken follow the words of this enactment; and the question raised on the bill of exceptions is whether the evidence given proved that the defendant below was guilty of both offences. The whole of the second section is subject to a proviso that the enactment shall not extend "to any money paid or agreed to be paid for or on account of any legal expenses bonâ fide incurred at or concerning any election." It is clear, therefore, that the Legislature did not contemplate that every previous promise to pay, or every subsequent payment of money, should be an offence. Is then the bonâ fide payment of money on account of travelling expenses illegal? It is not so at common law. Primâ facie, it is as reasonable

(*a*) February 1st. Before Alderson and Bramwell, Bs., and Cresswell and Williams, Js. Martin, B., and Crowder, J., heard part of the argument but left the Court before its termination.

for a candidate to pay a voter's expenses, as it is for a litigant to pay those of a witness; and, if the Legislature had meant to prohibit such payments absolutely, they *would have said so in express terms, as they have with regard to cockades and banners in sect. 7. [*452 But the Legislature has not done so. No doubt, if the promise to pay travelling expenses was made with the corrupt intention to procure the vote, so as to be a cloak for bribery, it would be within this enactment; but it would, in that case, be illegal at common law, just as refreshments given to influence the election would be; Hughes *v.* Marshall, 2 Cr. & J. 118.† The giving of such refreshments at all on the day of election is now prohibited by sect. 23; but there is no such absolute prohibition as to money. The prohibition in the Act is of the promise "in order to induce any voter to vote," or of "corruptly" paying for having voted. In Bayntun *v.* Cattle, 1 Moo. & R. 265, Alderson, B., in laying it down that the payment of travelling expenses was illegal if made a cloak for bribery, states that there was a difference of opinion as to whether the payment of mere expenses out of pocket was legal. He rather intimates his own opinion that they were not. [ALDERSON, B.—In that case the controversy was whether the plaintiff was aware of the payments. It was clear, in fact, that they were not mere payments of money out of pocket; so that the question whether such would be legal or not was rather collateral.] In Bremridge *v.* Campbell, 5 Car. & P. 186 (E. C. L. R. vol. 24), Tindal, C. J., states the question for the jury to be whether the sums "were paid really and bonâ fide for travelling expenses, and travelling expenses only, or were paid to induce them to give their votes." The evidence, set out on this bill of exceptions, is that the defendant read to his agent, for his guidance, this opinion of Tindal, C. J., and the agent, acting in strict conformity with it, bonâ fide *paid the travelling expenses only. Even if the Chief Justice was wrong in his law, it can hardly be called corrupt to [*453 defer to him. But he was right: it cannot be illegal in the candidate to send a son or a friend in his carriage to the poll gratis; and, if it be not, the mere payment of the expenses, instead of furnishing the carriage gratis, cannot make a difference; and the word "corruptly" cannot be rejected in the definition of the offence of paying money. If a person who has been a candidate learns, long after the election is over, that a person who voted for him has been on that account dismissed from his employment, or turned out of his farm, and is consequently now in beggary, and he exerts himself in his favour, he certainly does acts such as stat. 17 & 18 Vict. c. 102, s. 2, enumerates, and he does them "on account of such voter having voted;" but he is not guilty of a misdemeanour unless this is done "corruptly." The utmost extent to which the evidence here goes is, that the defendant authorized legal payments; there is none that he did it corruptly.

O'Malley, contrà.—It appears on the bill of exceptions that a wit-

ness gave evidence that in the committee room, in his presence, the question of travelling expenses was discussed; that Peed, the election agent, asked Slade, the candidate, whether it would be legal to get up the outvoters and pay their legal travelling expenses, what they paid out of pocket. In answer to that inquiry Slade cited a legal opinion, that it was legal to pay the expenses to bring up the outvoters; he said this for the guidance of Peed. The witness then wrote to an outvoter to bring *him up, asking him to vote for Slade, and added, that his expenses would be paid. The outvoter did come up and vote; and his expenses were paid by the agent. The first question is, whether this was not some evidence of authority from Slade to bring up the outvoters; and, in order to induce them to come up and vote for him, to promise to pay the expenses out of pocket. The next question is, whether such a promise is not forbidden by the very words of the statute; and whether a payment made in pursuance of an illegal promise is not corrupt. It may be that the defendant mistook the law, and thought the illegal act legal; but ignorance of the law does not excuse. [Cresswell, J.—It is no excuse when the act which he does is itself illegal; but, if the intention is of the essence of the offence, it is necessary to prove it. Such an intention may coexist with ignorance of the law; as, for instance, a person ignorant of the Acts which make things fixed to the freehold the subject of larceny may have such an intent to steal them as will make him guilty of larceny. But the question here is, whether *corruptly* is made part of the description of the offence.] It necessarily must be corrupt if the moving cause is the vote; all the mischief arises from that; Allen *v.* Hearn, 1 T. R. 56. In the supposed case of relieving a persecuted elector, the moving cause is not his having voted, but his being in distress. But, if the moving cause were the vote, as if a candidate held forth that he would indemnify all who suffered in his cause, and did so, it would be corrupt and within the Act. The proviso is not very intelligible. Perhaps it was meant *454]

*454]

*to apply to such a case as a debtor paying his just debts to a creditor, not so much because he was a just creditor as because he had election influence. *455]

Knowles was heard in reply. *Cur. adv. vult.*

Alderson, B., in this vacation (May 9th), delivered the judgment of the majority of the Court.

This case comes before us on a bill of exceptions: and the sole question to be determined is, Whether the exception taken to the ruling of the learned Judge can be sustained; and that exception is, that the matters produced and given in evidence on the part of the plaintiffs below are not sufficient to entitle the plaintiff to a verdict, and ought not to be left to the jury.

In determining this question, we are to look to the declaration: and, as that follows the words of the statute on which it is founded, we have

to construe that statute. We are not called on to go into any general considerations as to what would be bribery if the statute had simply prohibited that offence, by that word; what we have to do is, to construe a positive law which enacts that to "promise" "money" to a voter "in order to induce any voter to vote," and "corruptly" to give money to a voter "on account of such voter having voted," are severally matters which subject to a penalty the person so promising or giving. And, upon the construction of this statute, we are of opinion that a promise to a voter of his travelling expenses, conditionally on his coming and voting for the promisor, is within the first cited part of the enactment; but that a promise of travelling expenses not so conditioned is not. What the statute meant to prohibit *was an act directly [*456 calculated to influence the vote: and it is impossible to say that a voter finding himself under the necessity of voting for a particular person or losing his travelling expenses, which he has been promised if he does vote, is not under an inducement to vote. The statute cannot mean to regard the condition of the promisor's mind; otherwise such a promise made to A., who has clearly already determined to vote for the promisor, and whom the promisor did not propose in any respect to influence, would be out of the statute, while a promise made in the same words to B., who was not in that situation, and whom it was intended to influence, would subject the promisor to the penalty. Nor can it be supposed to regard the voter's mind, as, in like way, the same promise might or might not be lawful according to the disposition of the different persons to whom it was made with the same intent. It is the act itself which the statute intended to prohibit. On the other hand, an unconditional promise of travelling expenses to a voter to go to the place of polling, with leave to him to vote or not, as and how he likes, seems to us certainly not a promise of money to induce the voter to vote, being neither a promise with that view nor directly calculated to cause it. This construction is confirmed by the 3d section, which must have a corresponding meaning to the second, and which certainly would include a voter contracting for travelling expenses for his vote or his agreement to vote, and would exclude the mere unconditional receipt of those expenses. So again the 4th section only prohibits the *corruptly* giving of meat, &c., for the purpose of *corruptly* influencing a voter to give a vote. It does not prohibit the bonâ fide giving of such meat, &c., *unconditionally; while sect. 23 absolutely prohibits [*457 any giving of refreshment to any voter, on the day of nomination or day of polling, on account of his having polled, or being about to poll, without using any such words as "in order to induce." Now a giving of refreshment might clearly be within sect. 23, and not within sect. 2, because not given in order to induce the voter to vote; and it is difficult to see why a promise of travelling expenses should inevitably be within sect. 2, when a promise of refreshment may not be. Again, con-

sider the consequence of holding that an unconditional promise to pay travelling expenses is within the statute. Would giving a free passage by railway be so, as a gift of a valuable consideration? If not, there seems an absurdity: viz. that to give the price paid for the place is illegal, but to give the place itself is not. If the free passage is within the statute, so also would be taking a person in a private carriage; and the result would be, that any one taking in his own carriage a voter to the place of election without any bargain that he should vote would be guilty of a crime or misdemeanour, punishable by fine and imprisonment, subject to a penalty of 100*l.*, and liable to be disqualified for life from voting; which is an alarming and almost an absurd consequence.

There is no authority on the construction of this Act: and the words of previous Acts are different. Stat. 2 G. 2, c. 24, s. 1, required an oath to be taken by the voter that he had received no money or reward or promise *for* money "in order to give my vote;" and sect. 7 imposed a penalty on a voter who agreed for "money or *other reward*" "to give his vote," and on a person who by gift or *reward*, or promise of gift *458] or *reward*, corrupted *or procured a person to vote. And stat. 49 G. 3, c. 118, prohibited agreements to give money to procure a return; and see stat. 7 & 8 W. 3, c. 4. Under these Acts some election committees have held the payment of travelling expenses legal, and some illegal; and different opinions have been expressed by Judges: see per Alderson, B., Bayntun *v.* Cattle, 1 Moo. & R. 465, and per Tindal, C. J., Bremridge *v.* Campbell, 5 C. & P. 186 (E. C. L. R. vol. 24), Rogers On Elections, 7th ed., 256. But probably the apparent difference of opinion may have arisen from the difference of the circumstances of the particular cases. But it must have been known to the Legislature that such payments had been held legal: and it seems strange that, if intended to be absolutely prohibited, they should not have been prohibited in express terms. It will be seen we attach no weight to the proviso at the end of sect. 2 of stat. 17 & 18 Vict. c. 102. The same proviso was in stat. 49 G. 3, c. 118, s. 2; but it is nugatory, as may be seen by reading it affirmatively instead of negatively, viz. "this Act shall only extend to money paid" "for illegal expenses." It is an instance of what is very common, viz. a superfluous provision ex majori cautelâ: or, if it has any meaning, it is that given to it by the learned counsel for the defendant in error, viz. payment to a printer or innkeeper of lawful expenses, with a view indirectly to induce him to vote. It cannot mean to legalize a promise made directly to induce a voter to vote; and no other promise is within the statute.

We are further of opinion that, if the letter of August 12th, 1854, is evidence of a promise within the statute, viz. a promise to pay conditionally on the voter voting, and made to induce him to vote for Lord *459] Maidstone and *the plaintiff in error, then there is no evidence against the plaintiff in error that he authorized it. For we agree

with the opinion he expressed, viz. that it is lawful to defray travelling expenses to bring up the outvoters; and we cannot see that that opinion, which does not imply that the voting may be made a condition, authorized the making of a promise so conditioned, and therefore (as the plaintiff must contend) a promise prohibited by law. This of course would necessitate a venire de novo.

But we entertain a similar opinion as to the second count. We agree with the learned Judge that the pravity or honesty of intention of the plaintiff in error is immaterial, if he does the thing prohibited. But we think the word "corruptly" has a definite meaning. If, for instance, there had been a previous unlawful promise, conditional on the voter voting, or if there had been a previous understanding to that effect, or a corrupt bargain for the future, we think the case would have been within the statute. But we are clearly of opinion that merely paying the travelling expenses, honestly, with no previous engagement, is not prohibited. It was not within the former statute; Huntingtower *v.* Gardiner, 1 B. & C. 297 (E. C. L. R. vol. 8): and to hold that it is within the present is to give no meaning to the word "corruptly," which appears so emphatically used in relation to the *subsequent* doing of an act, and omitted as to the *previous* promise to do it; a construction which, if correct, would make a person giving money or procuring an employment within the second branch of the second section, at any distance of time after the election, the receiver and giver being then equally *unconnected with the same constituency, or any other, liable to the several penal consequences we have before referred [*460 to. We think this cannot be: and that, as there was (for the reason above given) no evidence of a previous promise or other matter to make the gift corrupt, there was no evidence in support of the second count. On this ground also there should be a venire de novo.

WILLIAMS, J.(*a*)—I have the misfortune to differ from the rest of the Court in this case.

As to the seventh count, I think there was evidence for the jury that Mr. Slade promised a voter to pay his travelling expenses, and that the object of such promise was to prevail on him to come and vote for Mr. Slade at the election. And I am therefore of opinion that there was *some* evidence of a promise of money to a voter to induce him to vote, according to the allegation of that count, and the language of the second section of the statute in question.

As to the eighth count, I think the same view ought to be taken; for there was some evidence that Mr. Slade, *in performance of a previous promise*, had paid the travelling expenses of a voter who had come and voted for him at the election. And this, I think, amounted to some evidence, not only that Mr. Slade had given money to the voter on account of his having voted, but that he had given it corruptly: because

(*a*) This judgment was read by Bramwell, B.

the promise, in my view of the statute, is to be deemed bribery. And, if so, a payment in performance of it is, I apprehend, a corrupt payment within the meaning of the Act.

*461] Whether, as it was contended in the argument, the *learned Judge before whom the cause was tried misdirected the jury with respect to the application or effect of the evidence, is a question on which it is unnecessary to express any opinion, because no such point appears on the bill of exceptions to have been made at the trial. The only question open for argument is, whether there was *any* evidence to be left to the jury in support of these counts.

I am quite aware that the statute, as I have construed it, will act harshly, and apply to cases which can hardly have been in the contemplation of the Legislature. But the language of the Act appears to me so plain and unambiguous that these considerations afford only an argument to prove that the statute was inconsiderately passed, and ought to be amended. Venire de novo awarded.

END OF EASTER VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Trinity Term,

XIX. VICTORIA. 1856.

The Judges who usually sat in Banc in this Term were:

Lord CAMPBELL, C. J. — ERLE, J.
COLERIDGE, J. — CROMPTON, J.

EDWARDS and Others, Assignees of HENRY HOUGHTON, a Bankrupt, *v.* JOSEPH COLEN WAKEFIELD.

In an action of trover by the assignees of an alleged bankrupt, the defendant obtained a rule Nisi to administer interrogatories to the plaintiffs to discover what case they intended to set up at the trial, and on what acts of bankruptcy they intended to rely.

Held that the interrogatories were inadmissible; at all events on the ground that they were fishing interrogatories, asking for a disclosure of the evidence in support of the plaintiffs' case. *Semble*, that the power to interrogate under the Common Law Procedure Act, 1854, is confined to such discovery as might be obtained in equity on evidence, and does not extend to a discovery of the case itself, as distinguished from the evidence.

JOSEPH BROWN, in last Easter Term, obtained a rule calling on the plaintiffs to show cause why they should not answer certain interrogatories.

*The declaration in the action was in trover for bills of exchange and policies of insurance, the property of the plaintiffs, as assignees, and for money had and received to their use. The particulars of demand showed that the plaintiffs claimed to recover the proceeds of nine bills of exchange described, and two specific sums of 1500*l.* and 1040*l.*, and generally all money received by the defendants from the bankrupt since the 1st day of January, 1855. Pleas to the count in trover: 1. Not guilty; and, 2. That the goods were not the goods of plaintiffs. 3. To the residue of the declaration, Never indebted. 4. To the whole, that plaintiffs were not assignees. 5. That Houghton was not a bankrupt. [*463

The affidavits on which the rule was obtained disclosed that defendant was a merchant in London: that Houghton, the alleged bankrupt, had been a merchant in London, trading between this country and Australia; and that the defendants and others had, in 1852, made consignments to Houghton and his correspondents in Australia. That Houghton was indebted to them on these accounts, and at the request of his principal creditors, went, in May, 1854, to Australia, for the purpose of realizing the property there, and there made consignments and remittances to the defendant to a large amount, the proceeds of the whole of which consignments and remittances were claimed in this action. Houghton returned in September, 1855, and afterwards was adjudged a bankrupt. The defendant and his advisers did not know whether the acts of bankruptcy intended to be relied on were supposed to be committed in this country before sailing to Australia, or by going
*464] to Australia, or by supposed fraudulent preferences; nor how they could *be made liable; and the plaintiffs had refused them information.

The proposed interrogatories were as follows:

1. What case do you intend to set up at the trial of this action as entitling you to recover against the defendants therein? 2. On what ground, or grounds, do you claim of the defendants the bills of exchange, policies of assurance, and other documents, mentioned in the first count of the declaration and in the particulars of demand herein, or the value thereof? 3. On what ground, or grounds, do you claim the respective sums of 1500*l.*, and 1040*l.*, mentioned in the particulars of demand herein? 4. On what ground, or grounds, do you claim the other sums of money mentioned in the particulars of demand as received by the defendants under the indenture of the 24th of May, 1855, or paid or remitted by or on account of the alleged bankrupt to the defendants or received by them? 5. Do you claim the said bills, policies, or documents, or sums of money, or any and which of them, on the ground that the same were delivered or transferred to or received by the defendants after notice of an alleged act of bankruptcy committed by the said Henry Houghton? If so, what was the act of bankruptcy on which you rely? when was it committed? and when and how do you allege the defendants had notice of it? 6. Do you claim the said bills, policies, documents, and moneys, or any and which of them, on the ground that the same were delivered, transferred, or paid to the defendants or to their account, by way of alleged fraudulent preference? 7. Do you claim the said bills, policies, documents, and moneys, or any
*465] of them, on any other ground than those above *suggested? If so, state which of them are so claimed, and the ground of each distinctly.

In last Term,(*a*)

Aspland, showed cause.—The Common Law Procedure Act, 1854

(*a*) May 8th. Before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.

(17 & 18 Vict. c. 125), sect. 51, gives the right to deliver interrogatories to the opposite party as to any matter on which discovery may be sought, "provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter." Sects. 54 and 55 provide that, where the interrogatories are to be followed up by a vivâ voce examination, the proceedings shall be conducted in like manner as under stat. 1 W. 4, c. 22. These provisions show that the interrogatories can be only as to matters of evidence. The plaintiffs in this case could not, if called as witnesses, be examined as to the way in which their legal advisers proposed to shape their case. The interrogatories in substance ask to see the brief prepared to instruct the plaintiff's counsel at Nisi Prius. Even where the matters interrogated upon are evidence, it must be shown affirmatively that the answers may be expected to support the interrogating party's case; Whateley *v.* Crowter, 5 E. & B. 709 (E. C. L. R. vol. 85). It is not shown here that the defendant has any case to advance. It is rather an attempt, under colour of the Act, to get extensive particulars of demand, than an attempt to get discovery. It is like what Lord Loughborough called a fishing bill; Ivy *v.* Kekewick, 2 Ves. 679.

Joseph Brown and *T. H. Terrell*, in support of the *rule.— [*466
Interrogatories demanding a discovery of what the plaintiff's case was were allowed by the Court of Exchequer in Flitcroft *v.* Fletcher, 11 Exch. 543.† And this was right; for that is a matter as to which discovery may be sought in equity; and the object of the Act was that all discovery in aid of a suit should be obtained in the same Court in which the principal suit was. In The Attorney-General *v.* The Corporation of London, 2 Macn. & G. 247, 253, the first interrogatory was: "Whether it is not true that no charter or letters patent given or granted by any of Her Majesty's predecessors, kings or queens of this realm, contain any grant of the ground, soil, or bed of the river Thames, or of the shores thereof between high and low water mark, to the Mayor, Commonalty, and Citizens, or how do the defendants make out the contrary; and that the defendants may discover and set forth, under or by what charter, or letters patent, or other grant they claim to be entitled to the freehold of the soil." Lord Cottenham, C., allowed that interrogatory, on the ground that the plaintiff in discovery is always entitled to a discovery of the case on which the defendant relies. He comments upon the passages in which that doctrine is discussed by Lord Redesdale in Mitford On Pleading (Ed. 4), p. 9, and Sir J. Wigram in Wigram On Discovery (Ed. 2), p. 285. The defendant in discovery must answer according to his knowledge, information, and belief; so that the discovery is not confined to matters within the defendant's personal knowledge, on which he could give evidence as a witness. [Lord CAMPBELL, C. J.—But has there ever been a case in equity in which such an interrogatory as the first in this case has been

allowed? Has any plaintiff in equity ever asked, What case do you *intend to set up at the trial of the action?] Probably not in that form, because such an interrogatory would be productive of no benefit. The defendant in discovery could not refuse to answer the interrogatory: but, if he answered, "such case as the rules of law permit and my counsel learned in the law shall advise," it would probably be held a sufficient answer to an interrogatory in those terms. But the now defendant could, if plaintiff in discovery in equity, by apt pleading in his bill of discovery, force the plaintiffs to disclose the nature of their case, though not the evidence in support of it. That was in effect done in The Attorney-General *v.* The Corporation of London, 3 Macn. & G. 247. The bill in equity would at very great length expand what is contained in the fifth interrogatory here.

*467]

Lord CAMPBELL, C. J.—Were it not for the case of Flitcroft *v.* Fletcher, I should be prepared to say that this rule should be discharged. In deference to that authority we shall take time to consider.

Cur. adv. vult.

Lord CAMPBELL, C. J., in this Term (June 10), delivered judgment.

This was an application by the defendant to be allowed to deliver interrogatories to the plaintiffs under the 51st section of the second Common Law Procedure Act. The action was in trover by the assignees of a bankrupt, to recover property alleged to form part of the bankrupt's estate: and the proposed interrogatories were for the purpose of compelling the plaintiffs to state *upon oath what act or acts of bankruptcy they intended to rely upon in support of the title of the assignees. We think that the application is not authorized by the enactment in question. From the provision limiting the power of delivering interrogatories to persons only who could give evidence, and from the subsequent sections, referred to in the argument, where provision is made as to depositions, and stat. 1 W. 4, c. 22, as to evidence taken under commissions is referred to, we are disposed to think that the section now under our consideration is intended to apply to cases only where the matters inquired into would be evidence in the cause, and that it was not intended thereby to give one party the power of asking the other how he intends to shape his case. Such an inquiry is a mode of requiring particulars on oath without the party being obliged afterwards to confine himself to the particulars. When the justice of the case requires such particulars to be given, the Courts have generally the means of compelling them to be given under such provisions as are reasonable. We think that we ought, at all events, to hold that the discovery, under the 51st section, is limited, by the words "upon any matter as to which discovery may be sought," to the cases where a discovery would be given in equity: and we think that the proposed questions clearly fall within the rule, that a party is not to make a fishing application as to the manner in which his adversary intends to shape

*468]

his case, and as to the evidence by which he intends to support it. It was conceded by the learned gentleman who attended on this occasion from a Court of Equity, that, in answer to such questions as the present in a discovery bill, the plaintiffs at law would be entitled to say "I shall support my case by *any acts of bankruptcy, which I can prove, and which I shall be advised to rely on." The danger [*469 into which a defendant may be put by not knowing what acts of bankruptcy may be relied on has long been felt; and the Legislature has interfered to do away, in some cases, with the hardship of the relation to prior acts of bankruptcy: but we never knew of any application to a Court of Equity to compel the assignees to state upon oath what acts of bankruptcy they intended to rely upon. If that course could have been adopted, it would, we think, have been frequently resorted to.

We were much pressed with the recent case of Flitcroft *v.* Fletcher (11 Exch. 543†), in the Exchequer. If the Court there meant to decide that the defendant may always ask the plaintiff to declare on oath how he means to shape his case, we are not prepared to assent to it; and we should not feel ourselves bound, by a decision of this nature, to the same extent as where a decision can be reviewed on error, even if the case were precisely in point. Considerable part of the discussion, in that case, seems to have been on the nature of the action of ejectment: and we entirely agree with the first resolution of the Court, that the action of ejectment is one in which interrogatories, under the 51st section of the Act, may be administered. On the other point, the Court relied, in some measure, on the nature of real actions, where it was said the pedigree must be specially stated, a ground which, even if well founded, would not apply to the present case. They seem also to have relied on a decision of a Court of equity as to disclosing a pedigree, and not to have considered the case as one really asking for *the [*470 mode or manner of shaping the plaintiff's case, and for the evidence in support of such case. One learned Baron referred to the practice of granting particulars; which does not seem to us a good reason for the construction to be put upon the Act. We are of opinion that it is not competent for a defendant to require a plaintiff to answer on oath how he intends to shape his case, by interrogating him as to the acts of bankruptcy upon which he proposes to rely: and we think therefore that the present rule should be discharged; the costs to be the plaintiffs' costs in the cause. Rule discharged.

WILLIAM BRASS and JAMES STANES *v.* FREDERICK CHARLES MAITLAND and JOHN DICK CRUM EWING.

First count: That plaintiffs were owners of a general ship; that defendants caused a corrosive substance to be packed in casks, and delivered to plaintiffs, as casks of bleaching powder, to be carried in the ship: that plaintiffs and their agents were ignorant that bleaching powder contained a corrosive substance, and the casks outwardly appeared to be sufficient; but that the casks were insufficient, and the contents so improperly packed, that the corrosive contents escaped and destroyed the cargo. Second count: That defendants shipped a dangerous article, knowing it to be such, without notice of its danger; and the plaintiffs, without knowledge of its dangerous nature, received it, and stowed it in the hold, where it did mischief. Pleas 3: to so much of the first count as relates to the insufficiency of the packages: that defendants purchased the goods ready packed from third persons, named, and were not themselves, or by their servants, guilty of negligence. Plea 4, to first count: that the persons employed on the ship knew and had the means of judging of the sufficiency of the casks. Plea 10: to the second count: that the master of the ship knew, or had the means of knowing the dangerous nature of the goods. On demurrer to the pleas:

Held, by Lord Campbell, C. J., and Wightman, J.: that there is an implied undertaking on the part of shippers of goods on board a general ship that they will not deliver to be carried on the voyage packages of a dangerous nature, which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature, without giving notice. That, consequently, both counts were good, and the 3d plea bad. But that the 4th and 10th pleas, which they construed to amount to an allegation of facts equivalent to notice, were good.

Held, by Crompton, J.: that the implied undertaking of the shipper did not extend beyond an obligation to take proper care not to deliver dangerous goods without notice; and that on the first count and third plea, taken together, the defendants appeared to be innocent shippers of goods, dangerous in fact, but without any negligence on their parts. And that, therefore, the defendants should have judgment on the third plea. He agreed with the rest of the Court that the 4th plea was good, and the second count good; but he construed the 10th plea as not amounting to an allegation of notice, and therefore held it bad.

FIRST count: that plaintiffs were owners of the ship Regina, lying at London, and bound for Calcutta, as *a general ship; that chlo- *471] ride of lime is an article of a corrosive and dangerous nature, and gives forth corrosive fumes, and is highly injurious to other goods with which chloride of lime, or the fumes thereof, come in contact, and is an article requiring, in order that it may be safely carried on a voyage, to be packed carefully and skilfully, and in packages, not liable to be corroded by, and sufficient to keep and contain, the said chloride of lime, and the fumes thereof, during the voyage; that defendants, well knowing the respective premises, packed, and caused to be packed, a large quantity of an article, consisting, in a great degree, of chloride of lime, in sixty casks, for the purpose of being sent to Calcutta in the said ship of the plaintiffs, and delivered the casks to the master of the ship, who then received them, as sixty casks of bleaching powder, shipped by the defendants, in good order and condition, weight and contents being unknown to the master, to be carried to Calcutta in the said ship: that, when the master so received the casks, the master and all persons employed on behalf of the plaintiffs in the ship were ignorant that bleaching powder, then by the defendants mentioned as the contents of the casks, contained or consisted of chloride of lime, or any article of the corrosive nature hereinbefore mentioned: that the casks,

when delivered to the master, appeared outwardly, to the master, to be sufficient to keep in their contents during the said voyage to Calcutta, and the contents thereof appeared to be sufficiently packed; and the master of the ship had not, and the plaintiffs and their servants, in that behalf, had not, knowledge or means of knowledge that the said casks were not so sufficient, or *the contents thereof not sufficiently packed. Yet the casks, when delivered by the defendants on board the ship, were insufficient to keep in the contents during the voyage; and the bleaching powder and chloride of lime, in the said casks, was carelessly, negligently, unskilfully, and insufficiently packed in the said casks; and by and through such insufficiency of the casks, and insufficient, careless, and negligent packing, the bleaching powder and chloride of lime, during the voyage, corroded and burst the casks, and got out and destroyed goods then in the ship, for the safe delivery of which, at Calcutta, the plaintiffs were, under bills of lading, responsible to the shippers, to whom they had been obliged to make good the loss. [*472

Second count: that, the plaintiffs being owners of the ship Regina, lying at London, bound for Calcutta as a general ship, the defendants wrongfully sent to the ship, for shipment therein to be carried to Calcutta, sixty casks containing an article of a highly dangerous and corrosive nature, consisting, in a great degree, of chloride of lime, and which the defendants knew to be an article of such a nature, without giving due or any notice to the master of the said ship, or to any person or persons concerned or employed therein on behalf of the plaintiffs, of the dangerous and corrosive nature of the said article, so that the persons concerned for the plaintiffs in the ship might stow and deposit the said casks in such part of the ship that the same might not, during the voyage, endanger the other goods stowed and conveyed in the ship; and the said master of the ship and the other persons concerned, on behalf of the plaintiffs, in the stowing of the ship, not knowing of the nature of the said article, stowed and placed the said casks in the hold *of the ship, and among the other goods and merchandise in the ship, the same being a proper and prudent place wherein to stow ordinary articles, but an improper and imprudent and dangerous place wherein to stow articles of a dangerous and corrosive nature: that, during the voyage, the chloride of lime, and the fumes thereof, escaped from the casks; and the casks, being in the hold with the other merchandise, mixed with and corroded and destroyed the other goods and merchandise, which would not have been the case had the said casks been stowed elsewhere, as they ought to have been, and would have been, if the nature of the said chloride of lime had been known to the plaintiffs and their servants: and the plaintiffs, being responsible, to the shippers of the said goods so damaged, for the safe delivery thereof at Calcutta, under bills of lading, have become liable to make good the [*473

said damage, and have been forced and obliged to make it good to the shippers of the said goods.

Plea 3: to so much of the first count as relates to the alleged insufficiency of the casks: that defendants did not personally, by themselves or their servants, pack the said casks and their contents, or any of them, as in the first count of the declaration alleged; but that they ordered the same of Messrs. T. Burnett & Sons, of Newcastle upon Tyne, to be supplied and packed by them for the purpose of being sent to Calcutta; and the same were so supplied and packed accordingly by the said Messrs. T. Burnett & Sons, and by the defendants delivered on board the plaintiffs' said vessel the Regina, as so supplied and packed by the said Messrs. T. Burnett & Sons; and that the defendants and Messrs. T. Burnett & Sons, and each of them respectively, did not know or believe, *and had no reason to know or believe, that the casks *474] were not proper or sufficient.

Plea 4: to the first count: that the master knew that the casks contained bleaching powder, and that he knew, or had the means of knowing, and reasonably might and could and ought to have known, that bleaching powder contained and consisted of chloride of lime; and that the master and persons employed by the plaintiffs in the said ship knew, and had the means of judging of, and knowing, the state and condition and sufficiency of the casks, and of the packing of the contents thereof.

Plea 10: to the second count: that the article contained in the casks was bleaching powder, as the said master well knew; and that the master knew, or had the means of knowing and reasonably might and could and ought to have known, the nature of such bleaching powder, being the article contained in the said casks.

Demurrer to each of these pleas. Joinder.

The case was argued in last Easter term.(*a*)

Blackburn, for the plaintiffs.—It appears on this record that the plaintiffs are shipowners who have put up their vessel as a general ship; the defendants are merchants, who have brought to that ship goods ready packed for the purpose of being carried in that ship: and the important question is, What is the legal obligation as to packing between merchant and shipowner in such a case, who are not strangers, but parties to a contract for the carriage of the merchant's goods in the shipowner's ship? There is, in fact, no ground in this case for imputing to the defendants either fraud or malice, or any moral *475] *guilt: and therefore the declaration has been purposely framed so as to charge them with only the neglect of their legal duty as shippers of dangerous goods, ready packed. The shipowner has no opportunity to examine the packages, which he cannot open, and which the merchant has taken upon himself to supply. It is reasonable, there-

(*a*) April 26th. Before Lord Campbell, C. J., Wightman and Crompton, Js.

fore, that he should expect the merchant, who brings goods of a dangerous nature so packed, to take care at least, that they are packed with reasonable and sufficient skill, in packages sufficient for the journey, and without negligence. The first count is framed on the supposition that a duty on the part of the merchant, to that extent at least, is implied by law, from the facts stated on the record. There is very little direct authority upon the subject; but this principle is recognised, and it is acted upon in analogous cases. In Story On Bailments, sects. 562, 563, after stating that it is part of the implied contract of every carrier to employ a vehicle suitable for the transportation, and, if by water, a seaworthy vessel, it is added: "On the other hand, the owner of the goods is bound to observe good faith towards the carrier (of which more hereafter), and to pack his goods, and put them in a fit condition for the journey; and if he does not, he must bear any loss arising from his own neglect." The obligation on the carrier to furnish a seaworthy ship, and on the merchant to supply the goods packed in a fit condition for the journey, are there treated of as coextensive; and from the nature of their situation they ought to be implied to the same extent. They are parties to a contract, each of whom has undertaken to furnish something which the other party must take on trust that it is reasonably fit for its purpose. The merchant has not *the means of examining into the condition of the ship [*476
which the shipowner supplies; the shipowner has not the means of examining the packages which the merchant supplies. Each knows of the trust of the other, and therefore, from the necessity of the thing, each impliedly warrants that what he supplies shall be reasonably fit for its purpose. The principle is the same as that on which the vendor who supplies an article to order is taken impliedly to warrant that it is reasonably fit for its purpose; Shepherd *v.* Pybus, 3 M. & G. 868 (E. C. L. R. vol. 42). It is in such a case immaterial that the article is not manufactured by the vendor, and that the fault is in persons from whom he obtained it; Brown *v.* Edgington, 2 M. & G. 279 (E. C. L. R. vol. 40). That case shows that, if the first count is good, the third plea is no answer. In Abbott On Shipping (part 3, chap. 6, s. 1, 5th ed. p. 270; Shee's Abbott, part 4, chap. 8, 8th ed. p. 402), it is said, "The merchant must lade no prohibited or uncustomed goods, by which the ship may be subjected to detention or forfeiture." This is given as an example of the duties of the merchant; the principle being, that "the hirer of anything must use it in a lawful manner, and according to the purpose for which it is let." It can hardly be said that the defendants did so when putting on board, without notice, dangerous goods improperly packed. In Crouch *v.* The London and North Western Railway Company, 14 Com. B. 255 (E. C. L. R., vol. 78), it was held that a common carrier was not justified in refusing to receive packages of goods merely because the customer would not tell him the contents of

the package. It follows that the customer must warrant that they are such, and so packed, as not to be dangerous. Independently of any *warranty, the defendants are answerable for the loss occasioned by placing dangerous goods in the neighbourhood of others; Vaughan *v.* Menlove, 3 New Cas. 468 (E. C. L. R. vol. 32). This would be so if the plaintiffs and defendants were strangers to each other, except from the proximity of their goods. The goods injured are not, it is true, the property of the plaintiffs; but they are responsible for them unless the delivery has been prevented by some of the excepted perils. The destruction of those goods by others packed along with them is not one of such excepted perils: this scarcely requires an authority; but it has been decided in this Court.(*a*) The second count avers a knowledge, on the part of the defendants, of the dangerous nature of the goods; and, that being so, it was their duty to give notice; Williams *v.* The East India Company, 3 East, 192.

*477]

The third plea is to the first count only, so far as relates to the insufficiency of the packages supplied. It admits the insufficiency of the packages, and that the shipowners had no means of knowing it, but alleges that the goods were furnished, ready packed, by Messrs. Burnett & Co., with whom the plaintiffs have no privity, and against whom they cannot *maintain any action. If, therefore, it is a good plea, the plaintiffs are without remedy. But, if the defendants caused the goods to be packed, and they were not packed with reasonable sufficiency, it is immaterial whether the defendants knew of that insufficiency or not, or whether it arose from their own act, or the act of those whom they trusted; Brown *v.* Edgington.

*478]

The fourth plea is an imperfect plea of Not Guilty. If the plaintiffs' agents neglected reasonable precautions, and the loss was attributable in part to that negligence, it is a defence; but all that is averred in the fourth plea is consistent with perfect prudence on the part of the plaintiffs and their agents.

The tenth plea to the second count, if it had averred that the plaintiffs' agents knew the danger, would have been an answer; for it could not have been necessary to give notice of what was already known: but it does not even argumentatively go further than to say that they *might* have known; which is no doubt true; for the master might have been a very skilful chemist.

Bovill, for the defendants.—The first count can be supported only if it imputes some fraudulent concealment or deceit on the part of the

(*a*) Gillespie *v.* Thompson. Easter Term, Friday, April 25th, 1856. This was a special case, in which the only question was whether the defendant, the shipowner, was answerable to the plaintiff, the shipper of goods, under the ordinary bill of lading, for damage sustained by those goods in consequence of the leakage of turpentine from casks belonging to third parties, no negligence being imputed to the defendant. *Joseph Brown*, for the plaintiff, was not called upon to argue. *Manisty*, for the defendant, admitted he could not support the defence.

Per Curiam. (Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.). The case is too clear for argument. Judgment for the plaintiff.

defendants; if there is such an averment, it is traversed by the third plea. There is no implied warranty in such a case as to the quality of the goods or the nature of the packages. The carrier, if he suspects anything is wrong, should make inquiries; no doubt it would be a fraud if such inquiries were answered untruly. Even in insurance cases "either party may be innocently silent, as to grounds open *to* [*479 *both*, to exercise their judgment upon;" Carter *v.* Boehm, 3 Burr. 1905, 1910, 2 Kent. Com. (3d ed.) 491. The 4th and 10th pleas are sufficient, as they bring the case within that principle. The second count distinctly avers knowledge on the part of the defendants, and ignorance on the part of the plaintiffs and their servants; and it must therefore be admitted to be good on the authority of Williams *v.* The East India Company, 3 East, 192: but the 10th plea avers that the master reasonably might and ought to have known the dangerous nature of the goods; and, if so, there was no occasion to give notice. The 3d plea to the first count raises the question whether there is any implied warranty as to the nature of the packages. There is no decision that there is such a warranty. The passage in Story On Bailments, sect. 563, is in reference to what will excuse a carrier from being responsible for the loss of goods: he is excused if the loss is by insufficient packing, but not if he has knowledge or means of knowledge of the insufficiency; Beck *v.* Evans, 16 East, 245. But the carrier cannot bring an action for such insufficiency; Baily *v.* Merrell, 3 Bulst. 94.

Blackburn was heard in reply. *Cur. adv. vult.*

In this Term (June 11th), judgment was delivered.

Lord CAMPBELL, C. J.—In this case I have prepared a judgment which my brother Wightman has read, and authorizes me to say he concurs in. I now read it. *My brother Crompton, who does [*480 not agree in all respects with this judgment, will deliver his own.

I am of opinion that both counts of the declaration are good.

The first alleges that the plaintiffs were owners of a ship put up by them as a general ship for a voyage from London to Calcutta; that chloride of lime is an article of a corrosive and dangerous nature, highly injurious to other goods with which it may come in contact, and requiring to be packed carefully and skilfully; that the defendants, well knowing this, packed and caused to be packed a large quantity of an article consisting chiefly of chloride of lime in casks, to be sent to Calcutta in the plaintiffs' ship, and delivered the said casks to the master of the said ship, as casks of bleaching powder; that the master received them as casks of bleaching powder, shipped by the defendants in good order and condition, contents unknown, to be carried to Calcutta in the said ship; that the master and all persons on behalf of the plaintiffs in the ship were ignorant that bleaching powder contained or consisted of chloride of lime or any article of the corrosive nature before mentioned; that the casks, when delivered to the master, appeared outwardly to be

sufficient to keep in their contents during the voyage, and to be sufficiently packed; and that the master had not, and that the plaintiffs and their servants had not, knowledge, or means of knowledge, that the casks were not so sufficient, or that the contents thereof were not sufficiently packed; yet, that the casks when so delivered were insufficient to keep in the contents during the voyage, and the bleaching powder and chloride of lime in the casks were carelessly, negli-
*481] gently, unskilfully, and *insufficiently packed. The count then goes on to allege that thereby the chloride of lime during the voyage corroded and burst the casks, and became mixed with, and injured and destroyed, other goods then in the ship, for the safe delivery of which at Calcutta the plaintiffs were, under bills of lading, responsible to the shippers: whereby the plaintiffs have been obliged to make good to the shippers and owners of the said goods the damage so occasioned.

I agree with the contention of the defendants' counsel that this count does not charge any fraud, or show any deceitful act or concealment which can be considered the foundation of an action purely ex delicto. But I think that it states facts which show that ex contractu a duty was cast upon the defendants, that they have violated this duty, and that, the violation of this duty having caused loss to the plaintiffs, a good cause of action is disclosed.

Where the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port, I am of opinion that the shippers undertake that they will not deliver, to be carried in the voyage, packages of goods of a dangerous nature, which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature. Mr. *Bovill* denied that there was any warranty whatever on the part of the shipper as to the nature of the article shipped, and contended that it was the duty of the master of the ship to ask for information if he wished to know particularly the nature of the goods, with a view to their stowage,
*482] quoting various decisions upon the *contract between buyer and seller, and between assured and underwriters. But these contracts are so essentially different from the contract between a carrier and the owner of goods to be carried, that the decisions upon them can here be of little assistance to us. One case he cited deserving particular notice, Baily *v.* Merrell (3 Bulst. 94,) from Bulstrode, in which it was held, between carrier and the owner of goods to be carried, that, although the defendant had represented the goods to be of a given weight, an action would not lie against him on the ground that they were of much greater weight, whereby the plaintiff's horse had been injured in drawing them. But there the representation must have been free from fraud, and the reason given for the decision is, that the carrier might without difficulty have ascertained the true weight of the goods. Therefore this

can only be regarded as an authority that the carrier has no right to expect any communication respecting the nature of the goods, where he may himself easily discover it. But here there is an allegation that the plaintiffs and their servants neither had knowledge nor means of knowledge of the dangerous nature of the goods, or of the defective packing, which increased the danger. If, under these circumstances, there were not a duty incumbent on the shipper to give notice of the dangerous nature of the goods to be shipped, commerce could not be carried on. It would be strange to suppose that the master or mate, having no reason to suspect that goods offered to him for a general ship may not safely be stowed away in the hold, must ask every shipper the contents of every package. If he is not to do so, and there is no duty on *the part of the shipper of a dangerous package to give notice [*483 of its contents or quality, the consequence is that, without any remedy against the shipper, although no blame is imputable to the shipowners or those employed by them, this package may cause the destruction of the ship and all her cargo, and the lives of all who sailed in her. In the course of the last term(*a*) we held that the owners of a general ship were liable to a shipper for damage done to the goods from other goods stowed in the hold, without allegation or proof of any wilful or negligent default on the part of the ship; and there can be no doubt that the present plaintiffs were bound to make good (as they allege that they have done), to the other shippers of goods to be carried on board their ship from London to Calcutta, the damage done by the chloride of lime shipped by the defendants. If the plaintiffs and those employed by them did not know and had no means of knowing the dangerous quality of the goods which caused the calamity, it seems most unjust and inexpedient to say that they have no remedy against those who might easily have prevented it. Although those employed on behalf of the shipowner have no reasonable means during the loading of a general ship to ascertain the quality of the goods offered for shipment, or narrowly to examine the sufficiency of the packing of the goods, the shippers have such means; and it seems much more just and expedient that, although they were ignorant of the dangerous quality of the goods or the insufficiency of the packing, the loss occasioned by the dangerous quality of the goods and the insufficient packing should be cast upon the shippers than upon the shipowners.

*It has been truly observed that there is no express decision [*484 to establish the liability of the shipper under such circumstances: but this liability has always hitherto been assumed, and has never been contested. In Williams *v.* The East India Company, 3 East, 192, the Court and the bar on both sides thought it clear law that it is the duty of a person putting on board a ship a dangerous commodity to give notice to the master, or other persons employed in the navigation, of its

(*a*) Gillespie *v.* Thompson, ante, p. 477, note (*b*).

dangerous nature, without any question being put; and so imperative is this duty considered, that the law strongly presumes that it was performed, insomuch that an action cannot be maintained for putting the dangerous commodity on board, without express evidence to prove a negative, that notice was not given. Under such circumstances, Lord Ellenborough held the rule of law to apply, "that where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burthen of proving the contrary, that is, in such case, of proving a negative, on the other side."

Lord Tenterden, in the chapter of his Treatise on Shipping, where he treats of "The general duties of the Merchant" (Abbott on Shipping, part 3, chap. 6, 5th ed., p. 270; Shee's Abbott, 8th ed., part 4, chap. 8, p. 402), lays down the general principle on which the doctrine rests: "the hirer of anything must use it in a lawful manner, and according to the purpose for which it is let." He then gives as an instance, "the merchant must lade no prohibited or uncustomed goods by which the ship may *be subjected to detention or forfeiture." Pari ratione, the merchant must not lade goods of a dangerous nature which the master and those employed in the navigation of the ship have no means of knowing to be of a dangerous nature, without giving notice of their nature, so that the master and those employed in the navigation of the ship may exercise an option to refuse to accept them, and, if accepted, may stow them where they will not endanger the rest of the cargo.

*485]

The first count of the declaration contains no specific averment as to the duty of the defendants as shippers; but, what is much better, it states facts showing that the duty in point of law arose; and it shows that this duty was violated, per quod the plaintiffs were damnified. If so, the first count is sufficient.

The second count, which is framed on the same principles, is allowed to be free from objection.

We must now therefore consider the sufficiency of the pleas. The third plea, which is the first demurred to, and which is pleaded to so much of the first count as relates to the casks, I consider insufficient. Waiving the objection that it seeks to divide the dangerous quality of the goods and the insufficiency of the packing into separate and distinct causes of action, I think that it discloses no defence as to the insufficient packing; for it only denies that the defendants personally, or by their servants, packed the casks, and alleges that they employed Burnet & Sons to pack them, and that neither the defendants nor Burnet & Sons knew or believed, or had reason to know or believe, that the casks were not proper or sufficient. The first count is not in deceit, founded on any guilty knowledge; the allegation of the insufficiency of the

casks, and of the dangerous nature of the *goods, is not denied by the third plea. It follows that the ignorance of the defendants, and those employed by them, can be no excuse for putting on board without notice the dangerous goods insufficiently packed. For this purpose it is quite immaterial whether the casks were made by the hands of the defendants themselves, or by their servants, or by Burnet & Sons, as their agents. The defendants, and not the plaintiffs, must suffer, if from the ignorance of the defendants a notice was not given to the plaintiffs, which the plaintiffs were entitled to receive, and from the want of this notice a loss has arisen which must fall either on the plaintiffs or on the defendants. I therefore hold the third plea to be bad. [*486

But I am of opinion that the fourth plea, which is pleaded to the first count, is a good bar. This is an argumentative plea of Not Guilty, alleging facts which, if true, show that the supposed duty relied upon in the first count did not arise, and that there was no actionable default on the part of the defendants. If "the master knew, or had the means of knowing, and reasonably might and could and ought to have known, that the bleaching powder contained and consisted of chloride of lime," and if "the master and persons employed by the plaintiffs in the ship knew, and had the means of judging of and knowing, the state and condition and sufficiency of the casks," according to the rule laid down in considering the validity of the declaration, there was no occasion for the defendants to give any express notice, and they cannot be charged with any breach of duty in putting the packages on board, however dangerous they might be. On this supposition, the loss which has happened is to be imputed to the carelessness and misconduct of the master and those employed by the *plaintiffs in stowing the casks where they were likely to injure other goods. A mere allegation of "means of knowledge" I think would not have been sufficient, as this might be satisfied by calling in skilful chemists, and resorting to investigation inconsistent with the usual course of commercial business; but the shippers were justified in acting upon the supposition that the master (to whom the goods are alleged to have been delivered) did know what "he reasonably might and could and ought to have known." Giving credit, as we are bound to do on this demurrer, to the allegations in the fourth plea, the master received these casks knowing the degree to which they were dangerous, in the same manner as if he had received carboys of vitriol, universally known to be most dangerous; and the defendants are not answerable for the consequences. [*487

I am likewise of opinion that the tenth plea, which is pleaded to the second count, is good. This count pointedly and exclusively rests upon the want of notice of the dangerous and corrosive nature of the article shipped. But there could be no occasion for notice from the defend-

ants to the master of that which "he knew or had the means of knowing, and reasonably might and could and ought to have known." The plaintiffs, impeaching the tenth plea, rest on this point of law, that, granting the facts averred in this plea to be true, it appears, on the record, that the damage sustained by the plaintiffs was the immediate result of the defendants' breach of duty. If, however, the facts alleged in this plea are granted, I am of opinion that there was no breach of duty in the reticence of the defendants when the goods were loaded, and that the loss must be taken to have arisen from a breach of duty, *488] on the part *of the master, in not refusing to accept the goods to be loaded in the ship, or in not taking care that they were so stowed as to secure the ship and the rest of the cargo from danger.

I therefore think that the plaintiffs must rely upon their traverse of the 4th and 10th pleas, and that on the demurrer to these pleas we ought to give judgment for the defendants, while on the demurrer to the declaration and to the 3d plea there should be judgment for the plaintiffs.

CROMPTON, J.—The second count of this declaration is framed on the breach of duty or wrongful act of the defendants in shipping dangerous articles on the plaintiffs' ship, which the defendants knew, and which the plaintiffs did not know, to be dangerous, without giving any notice to the plaintiffs of the dangerous nature of the goods. This count was admitted by the defendants' counsel to be good; and it clearly falls within the principle of the case of Williams *v.* East India Company, 3 East, 192. In that case Lord Ellenborough remarks, in giving the judgment of the Court in page 200, that, "in order to make the putting on board wrongful, the defendants must be cognisant of the dangerous quality of the article put on board." The second count of the declaration in the present case, averring such knowledge of the defendants, appears to me to be good.

On the 1st count and 3d plea difficult questions arise as to the duty or engagement of the shipper of goods, and as to the construction of the pleadings; and I am by no means satisfied that the plaintiffs are *489] entitled *to our judgment either on the 1st count and 3d plea considered together, or on the first count taken alone. It was stated, by the counsel for the plaintiffs, that the 1st count was purposely framed to charge the defendants with a breach of warranty, without imputing to them any fraud, deceit, or misconduct; in other words, that they are charged as innocent shippers of goods, who have broken a supposed implied warranty that the goods were fit to be shipped. It was said that there was an absolute warranty, without qualification, that the goods were fit for shipment on the voyage, and that they were not dangerous; and, if that proposition be maintainable, the plaintiffs would of course be entitled to succeed on the count; and neither the third plea denying negligence by the defendants or their servants, and deny-

ing knowledge of the danger on their parts, nor the 4th plea showing that the master and parties employed on the ship themselves knew of the dangerous nature of the packages, could be any answer to a breach of such an absolute warranty. If, however, the count is to be construed as inferentially charging a knowledge on the part of the defendants, and that be a necessary ingredient in the cause of action, it would be answered by the 3d plea, which avers that the defendants did not know, and had no reason to know, of the insufficiency of the casks. Again, if the count is construed as depending on a negligence in packing on the part of the defendants or their servants, that might be answered by the part of the plea which states that the packing was not their personal act or the act of their servants, but, as I understand the plea, that they ordered the goods from third parties, and that the goods were bought by them and supplied to them as puncheons when packed. This *seems to be an argumentative denial of the imputed negligence [*490 on their parts, or on the part of any persons for whose acts, as their servants, they were responsible. The first count states, in effect, that chloride of lime was dangerous, and required, for its being safely carried on a voyage, to be safely and securely packed; and it avers the defendants' knowledge of that fact. It states a packing by defendants and their servants; and that packing appears afterwards to have been negligent and unskilful. The count attributes the damage to the insufficient and unskilful packing, and states that the plaintiffs had no knowledge, or means of knowledge, of the insufficient packing. The engagement or duty of the defendants, and their breach of such duty or engagement, must arise from the *shipment*, and not from the *packing*, of the goods; and upon the whole the 1st count seems to me to be a complaint of delivering goods, dangerous from bad packing, and not known to the plaintiffs to be dangerous: and, either on the count, or on the count and 3d plea, it must, I think, be taken that the defendants are treated as innocent shippers, without knowledge, on their parts, that the goods, as packed, were dangerous; and, if the pleadings are so treated, the point arises, which it was stated it was the object of the parties to raise before us, as to the extent of the duty or engagement of shippers of goods, shipped in a general ship. What then is the nature and extent of this duty or engagement on the part of shippers of goods? On the one hand it is clearly a tortious act, for the consequences of which the shippers are responsible, to ship goods apparently safe and fit to be carried, and from which the shipowner is ignorant that any danger is likely to arise, without notice of such goods being dangerous, if the *shipper is aware of such danger. Such ship- [*491 ment, when the scienter is made out, is clearly wrongful and tortious; and perhaps an action on a contract to give notice in such a case might be supported, though it would seem rather to be the subject of an action of tort. On the other hand, I cannot agree with the doctrine,

contended for on the part of the plaintiffs, that there is an absolute engagement on the part of the shipper that the goods are safe, and fit to be carried on the voyage. Such a warranty would include the cases where the goods may be openly seen, and are known by the shipowner to be dangerous. It does not seem that there is any authority decisive on the point as to whether the shipper is liable for shipping dangerous goods without a communication of their nature, when neither he nor the shipowners are aware of the danger. It seems very difficult to hold that the shipper can be liable for not communicating what he does not know. Supposing that hay or cotton should be shipped, apparently in a fit state, and not dangerous to the knowledge of the shippers or of the shipowners, but really being then in a dangerous state from a tendency to heat, are the shippers to be liable for the consequences of fire from the heating of such goods? This is a most important question; for, if this be the law, the underwriters on the ship, who really ought to be the persons to suffer from such unexpected fire, might bring an action in the name of the shipowners against the shippers of goods, who would be made responsible for the accidental fire, when they were innocent, and would not be insured against the injury to the ship. Again, suppose that there is a new article of commerce which neither shippers nor shipowners know to be dangerous: is the innocent shipper *to be liable? Lord Ellenborough's dictum in Williams *v.* The East India Company, 3 East, 192, above referred to, would tend to show that knowledge of the party shipping is an essential ingredient. On the other hand, it is stated, in the passage from Abbott On Shipping, page 270, 5th edit. (page 402, 8th edit.), that the merchant must load no prohibited or uncustomed goods by which the ship may be subjected to detention or forfeiture. And this is laid down without any express qualification as to the knowledge of the shipper. In case of such goods, however, the merchant generally knows, or ought to know, from what he is presumed to be acquainted with as to the nature of his trade, whether the goods he is shipping can properly be sent to their proposed destination; and the passage in question is hardly a sufficient authority for the proposition that, where the shipper is perfectly innocent and without any means of knowledge, he should be liable to the shipowner for the consequences of a mistake which neither of them could have avoided. Suppose, for instance, that a shipment was made of goods for a foreign port to which, according to the information known at the shipping port, such consignment might be properly and safely made, but that by some recent law the foreign country had made such shipment illegal: would the shipper be liable in such case? I entertain great doubt whether either the duty or the warranty extends beyond the cases where the shipper has knowledge, or means of knowledge, of the dangerous nature of the goods when shipped, or where he has been guilty of some negligence, as shipper, as by shipping without commu-

*492]

nicating danger which he had the means of *knowing, and ought to have communicated. Probably an engagement or duty may [*493 be implied, that the shipper will use and take due and proper care and diligence not to deliver goods, apparently safe, but really dangerous, without giving notice thereof; and any want of care in the course of the shipment in not communicating what he ought to communicate might be negligence for which he would be liable: but, where no negligence is alleged, or where the plea negatives any alleged negligence, I doubt extremely whether any right of action can exist.

Treating this first count therefore as complaining of the insufficiency of the casks merely, and treating it as framed on some implied warranty as to such sufficiency, and taking the count and plea together as showing that there was no blame on the defendants or their servants, but that they were innocent shippers of goods, bought by them, and supplied to them imperfectly packed, I entertain great doubt as to the liability of the defendants on this part of the record; and, as at present advised, I incline to think the defendants not liable on such construction of the pleadings: but, as the rest of the Court who heard the case are of opinion that the first count is good, and that the third plea is no answer to it, the judgment of the Court on this part of the record will be for the plaintiffs.

I agree with the rest of the Court in thinking that the defendant is entitled to our judgment on the facts disclosed on the first count and the fourth plea. That plea alleges expressly that the master and persons employed in the ship knew of the state and condition of the casks and the packing. The count complains only of mischief occasioned by the insufficiency of the casks *and the packing; and I think [*494 the plea good as an argumentative denial of any duty or implied contract to communicate what the party knew, and as a denial of the allegation in the count that the plaintiffs had no knowledge of the insufficiency of the casks, or of the bad packing, to which the damage is attributed.

As to the tenth plea to the second count there is more difficulty. The second count charges a tortious non-communication of the dangerous nature of the goods which the defendant knew of, and which the master, and the parties employed by the plaintiffs in stowing, did not know of, and attributes the mischief to the stowing of the goods through such want of knowledge in a part of the ship, fit for safe, but unfit for such dangerous, goods. The tenth plea to the second count is very different from the fourth plea, in two respects: first, in stating that the master knew, *or* had the means of knowledge, in the disjunctive; and, secondly, in averring the knowledge or means of knowledge in the master only. If this plea could be treated as averring that the goods were of a nature well known in commercial and shipping transactions as dangerous, it might be good as an argumentative denial of any duty

to communicate, or wrong in not communicating, what the parties were or might be fairly supposed to be aware of. On the construction of the plea in the disjunctive we must, I think, consider it as averring only that the master had the means of knowing, and ought, &c., to have known, as the plea must be taken most unfavourably to the party pleading, and as it would be proved by proving such averment without proof of actual knowledge. It is an averment that the master of the ship personally had the means of knowing, and ought to have known, *495] *of the danger. It does not appear to me to be necessary to decide whether the averment that the master had the means of knowledge, or that he ought to have known, without an averment of actual knowledge, would be a sufficient answer to the defendants' tortious neglect to communicate the dangerous nature of the goods. The count charges that there was no communication either to the master or to the other persons employed by the plaintiffs, and states that the master and the other persons concerned on behalf of the plaintiffs in stowing the goods, being ignorant of the dangerous nature of the goods, stowed them in a place unfit for such dangerous goods. It is quite consistent with the cause of action contained in this count, that the master may have known, as averred, that the article was bleaching powder, and may have had the means of knowledge, and that he ought to have known the nature of bleaching powder, without this forming an excuse for the unlawful negligence of the defendants, if damage was occasioned thereby. The master is not the party generally concerned in the shipping and taking on board or stowing of goods. He generally acts in signing his bills of lading upon the mate's receipts or notes. There is no averment that the mischief could have been avoided if the plaintiffs had used ordinary care, or that the mischief really happened from the default of the plaintiffs; and it may well be true, notwithstanding the plea, that, from the confessed wrongful negligence of the defendants, the persons concerned in taking on board may have stowed improperly, without the master's means of knowledge, or the fact that he might and ought to have known of the nature of bleaching powder, having anything to do with the case. If the plea had shown the goods *496] to *be of such a kind as that their nature was known in usual shipping transactions, it might have been good as negativing any necessity for communication; but it does not appear to me to amount to a defence of that nature. The master may have known that the article was bleaching powder; and the averment that he had the means of knowledge, and might and ought to have known the nature of bleaching powder, might be true; and yet, at the same time, the non-communication may have caused the mischief. The master may have trusted that the due communication would be made in the proper way to the parties who took the goods on board; and he may have had nothing to do with the shipment; and his personal knowledge and

means of knowledge, of which the shipper is not alleged to have been aware, seems to form no excuse for the non-communication to the parties employed in taking the goods on board.

I am inclined therefore to think the tenth plea not an answer to the second count: but, the rest of the Court being of a different opinion, the judgment on the demurrer to that plea must be for the defendants.

Judgment on the third plea for the plaintiffs. On the fourth and tenth pleas for the defendants.

*JOHN SLOPER *v.* GEORGE EDWARD COTTRELL. [*497

Count for money had and received. Plea, by way of defence on equitable grounds: that the money had been bequeathed by will to the separate use of plaintiff's late wife, who, during the coverture, assigned the money to the defendant, on trusts in which plaintiff took no interest. Replication, on equitable grounds, to this plea: that, before this assignment, plaintiff's wife had assigned the money to plaintiff, and that the receipt by defendant was as agent for the wife, in order to give a discharge to the executors.

Held, that the plea was good, admitting a receipt of the money, primâ facie to the use of the husband, and avoiding it by showing that in equity the receipt was on trusts in which the husband took no interest; thereby sufficiently negativing any marital right arising on her death.

Held, also, that the replication was good, as showing a previous equitable assignment for the plaintiff's benefit.

There was also a plea, by way of defence on equitable grounds: that by marriage settlement the plaintiff covenanted to settle any personal estate he might acquire in his wife's right: and that this money was bequeathed to her separate use.

Held, that this plea was bad: such a covenant not applying to money bequeathed to the separate use of the wife.

DECLARATION for money had and received, and on an account stated.

Plea 2. By way of defence on equitable grounds: that the said money in the declaration mentioned was money that one B. by will bequeathed to Georgiana, deceased, in her lifetime the wife of the plaintiff, for her own sole and separate use, and her receipt notwithstanding her coverture to be a sufficient discharge, and no other money whatsoever; that the money bequeathed to the separate use of the plaintiff's wife as aforesaid was paid by the executors of the will of B. to defendant, upon the separate receipt of Georgiana, whilst she was the wife of the plaintiff, and that Georgiana, whilst she was the wife of the plaintiff, disposed of the money in her lifetime independently of her husband, and in such manner that her husband took no interest therein, to wit, by directing the same to be paid to the defendant as aforesaid, to be held by him upon certain trusts, under which trusts the plaintiff took no interest; and *that the having and receiving of money by the [*498 defendant to the use of the plaintiff, as in the declaration mentioned, was and is the receipt of the money in this plea mentioned, by the defendant from the executors of the will of B., upon the same disposition by Georgiana of the same as aforesaid; and that the defendant

never received any money to the use of the plaintiff except as aforesaid. The plea contained averments that the account was stated of the same money.

Plea 3. By way of defence upon equitable grounds: that, at the time of the accruing of the causes of action in the declaration mentioned, Georgiana, now deceased, was the wife of the plaintiff; and that, by a settlement executed previously to, and in contemplation of, the marriage of the plaintiff with Georgiana, made between the plaintiff of the first part; Georgiana, of the second part; and A., B., C., and the defendant, of the third part; the plaintiff covenanted with the defendant and the other trustees of the said settlement that he would assign and make over to the defendant and the said other trustees as aforesaid any personal estate which should be acquired after the marriage by the said Georgiana, or the plaintiff in her right, during her coverture, by any means whatsoever, over and above the value at one time of the sum of 100*l.*; and that the defendant and his cotrustees should hold the personal estate which should be so acquired, upon the following trusts, specifying the trusts of the settlement. "That the money in the declaration mentioned was and is certain money above the value of 100*l.*, which one B., by her will, bequeathed to Georgiana, in her lifetime, whilst she was the wife of the plaintiff, for her own sole and separate use, and her receipt notwithstanding her *coverture to be a sufficient discharge, and which the plaintiff acquired at one time after his intermarriage with Georgiana, under and by virtue of the said bequest; and that he so acquired the same by the said Georgiana receiving the same during her coverture from the executors of the will of B.; and that the said having and receiving of money by the defendant to the use of the plaintiff was and is the receipt of the money in this plea mentioned, by the defendant as such trustee as aforesaid from the said Georgiana." The plea contained averments that the account was stated of the money.

*499]

Replication on equitable grounds to plea 2: that after the death of B., and after Georgiana had become, and while she was, entitled to receive the said money so bequeathed, as in the second plea mentioned, and before the having and receiving of the moneys in the declaration mentioned, and before any receipt of the said moneys by the defendant from the executors of B., and before any direction given by Georgiana that the money should be held by the defendant upon the said alleged trusts as in the second plea mentioned, and before any such alleged trusts ever were created or existed, Georgiana disposed of the whole of the money so bequeathed as aforesaid, by appointing and assigning the same, and all her right, title, and interest of every kind whatsoever thereof and therein, and then existing or thereafter to accrue to plaintiff, to enable him the plaintiff to pay certain debts then due from the plaintiff; and that, at the time that defendant first took and received

the said moneys from the said executors, the trust in the second plea mentioned had not been created, and did not exist; and that the said directions by Georgiana in the second plea mentioned, that the defendant should hold the said *moneys upon the said alleged trusts, were not given till long after defendant had received the said [*500 moneys from the said executors; and that defendant received the said money from the said executors as the agent of Georgiana, for the purpose of the due and proper payment of the moneys by the executors, and of giving to the said executors the due, proper, and necessary separate receipt of the said Georgiana, in order to the valid discharge of the said executors in that behalf, and not upon the alleged trusts in the second plea mentioned; and that, up to and at the time of the said receipt of the said moneys by the defendant from the said executors, the assignment of the said moneys by the said Georgiana to plaintiff continued in full force and effect, to all intents and purposes whatsoever; and that the said Georgiana directed the defendant to receive the said moneys from the executors for the purpose of such valid payment by them, and of the giving of such valid discharge and receipt to them as aforesaid, and not with the intent or purpose of annulling the assignment of the moneys to the plaintiff as aforesaid, but for the purpose of getting in the said money as the money of him the plaintiff; and that, by and immediately upon the receipt of the moneys by the defendant from the said executors as aforesaid, and long before the existence of the said alleged directions and trusts in the second plea mentioned, the said money became and was money had and received by the defendant to the plaintiff's use; which is the same having and receiving of the said moneys to the plaintiff's use in the declaration mentioned, and not other or different.

There was also a replication on equitable grounds to the third plea, which it is unnecessary to notice. There was a demurrer and joinder to each plea, and to each replication.

*The case was argued in last Term.(*a*)

Lush, for the plaintiff.—The second plea does not disclose any [*501 ground of equitable defence. On the death of the wife, the money in her possession belonged to the plaintiff in his marital right; the quality of separate property which it possessed in equity ceased at her death; Molony *v.* Kennedy, 10 Sim. 254. [Lord CAMPBELL, C. J.—In this plea it is averred that the money had been disposed of, by being paid to the defendant, to hold on trusts in which the plaintiff took no interest.] If construed so, the plea would seem to amount to a denial of privity; and if so, though good on the ground that it amounts to Non Assumpsit, it would be no defence in equity. [Lord CAMPBELL, C. J.—That objection may be cured at once by an amendment striking out the words "On equitable grounds."] The replication to the second plea

(*a*) April 22d. Before Lord Campbell, C. J., Erle and Crompton, Js.

is good, on equitable grounds: and, taking the plea and replication together, it sufficiently appears that the defendant taking the husband's money from the wife holds the money at law to the husband's use; Calland *v.* Loyd, 6 M. & W. 26.† The third plea is bad. Such a covenant as that set forth in the plea does not apply to money settled by others to the use of the wife; Travers *v.* Travers, 2 Beav. 179, Douglas *v.* Congreve, 1 Keen, 410, 423, Drury *v.* Scott, 4 Yo. & C. 264.†

Sir *F. Kelly*, contrà.—The third plea cannot be supported: but the second plea is good, and the replication to it no answer. Even supposing that the replication *shows an equitable assignment, complete as between the plaintiff and his wife, and antecedent to the transaction set out in the plea, still that is not enough. The defendant, having accepted a trust, and received the money in ignorance of any such previous equitable assignment, has a superior equity unless there was notice to him, or at least an intimation to the former trustee of the equitable assignment.

*502]

Lush was heard in reply. *Cur. adv. vult.*

Lord CAMPBELL, C. J., in this Term (June 6th), delivered judgment.

This was an action for money had and received and on accounts stated, in which the defendant pleaded, secondly and thirdly, two pleas by way of defence on equitable grounds. The plaintiff demurred to these two pleas, and also replied to each of them on equitable grounds. Upon the argument before us, Sir *Fitzroy Kelly*, on the part of the defendant, abandoned the third plea, which was clearly bad according to the authorities cited by Mr. *Lush*. It proceeded on the ground of a supposed equity against the plaintiff, under a covenant in a marriage settlement by him before marriage, to assign over to the trustees of the settlement any personal estate which should be acquired after the marriage by the wife, or by the plaintiff in her right. The money in question, however, appeared by the plea to have been money bequeathed to the sole and separate use of the wife, to which it was conceded that, according to the decisions in equity, the covenant of the husband did not apply. The questions therefore were reduced to those *arising on the second plea, and were, first, as to the validity of that plea, and, secondly, as to the validity of the replication. This plea set up an equitable right as against the plaintiff, by showing that the money in question was money bequeathed to the sole and separate use of the wife during the coverture, and that the wife had disposed of and assigned the fund upon trusts in which the plaintiff took no interest; in other words, that the wife had, as she was entitled to do, made an equitable assignment of her equitable right upon trusts in which her husband, the plaintiff, took no interest. Such matter, if well pleaded, would no doubt constitute a sufficient defence on equitable grounds: but it was contended, on the part of the plaintiff, that the allegations in the plea did not show that there might not be some equitable interest in the plaintiff.

*503]

We intimated our opinion, during the argument, that the allegations as to the trusts being such as that the husband took no interest under them appeared to us sufficiently to exclude the supposition that the husband could ever have any interest, either before or after the death of his wife, in the fund in question. And, the second plea being, in our opinion, sufficient as on a general demurrer, the question is reduced to the validity of the replication to the second plea. That replication sets up, by way of equitable ground, that, before the assignment and disposition by the wife on the alleged trusts in which the husband took no interest, the wife had appointed and assigned the fund in question to the husband, to enable him to pay debts due from him to the amount of the fund; and that the receipt by the defendant was a receipt by him as agent to the wife to get the money out of the hands of the executors, and to give them a discharge, not for *the purpose of annulling the disposition to the husband, but of getting in the [*504 money as the money of the plaintiff. We think that this is a sufficient answer on equitable grounds to the equitable defence of the defendant. That defence was an equitable assignment of the equitable right of the wife; and the answer is a prior assignment to the husband. It was said that this voluntary assignment to the husband could not avail; and this would be true as against a purchaser for value without notice: but there is nothing to show that the second assignment was not equally voluntary with the first; and, indeed, it is alleged in the replication that there was no value or consideration for the disposition, or for the creation of the trusts in the second plea mentioned. It was said, also, that the replication did not negative the supposition that the defendant might not have invested the money or disposed of it according to the trusts under the second assignment, without notice of the first: but such matter would be matter for a rejoinder; and we think it sufficient for the replication to show a prior assignment giving a sufficient equitable title without notice. The title of the plaintiff under the assignment to him would be, primâ facie, perfect in equity as between the parties, without notice to the defendant. Such want of notice is material in some cases, as, ex. gr., to take the property out of the order and disposition of a bankrupt; or it might constitute a defence if the trustee or holder of the fund had disposed of it through the laches of the first assignee in not giving notice of his title: but it is sufficient, in answer to a plea relying on the equitable assignment only, to show a good prior assignment of the fund which gives a good title to the plaintiff, as against parties claiming under the second assignment. *We think, therefore, that the plea by way of equitable defence is well answered [*505 by showing that such equity never arose against the husband, the present plaintiff, by reason of the prior disposition in his favour: and this is sufficient for the determination of the validity of the replication, as we think that this plea of equitable matter should be treated as relying

only on the equitable defence disclosed, and as admitting that but for such equitable defence the money in question was received for the plaintiff's use. It was suggested, however, that on the whole record it appeared that the plaintiff's only right was equitable, and that he could not on the facts have any legal right as against the defendant, a mere trustee, as between whom and the plaintiff it was said that the facts negatived the existence of any privity. If it had been necessary to have considered this ground, we should probably have arrived at the conclusion that the replication sufficiently shows that the money was received under the wife's direction, and as her agent, so as to make the defendant's receipt a receipt for her use, and consequently for her husband's, the plaintiff's, according to the principle acted on in Clelland *v.* Loyd, 6 M. & W. 26,† and Bird *v.* Peagrum, 13 Com. B. 639 (E. C. L. R. vol. 76); and therefore that the legal as well as the equitable right to this money was in the plaintiff.

We give our judgment that the second plea is good, and that the second replication to it is also good: and, on the pleadings before us, the judgment will be for the plaintiff. Judgment for the plaintiff.

*506] *FRANCES WALKER, Administratrix of DAVID PALMER WALKER, *v.* JAMES BUTLER. *May* 22.

A creditor who had, more than six years before the action, supplied ships' stores on seven separate occasions to the debtor, amounting in the aggregate to more than 300*l.*, within six years asked his debtor for money. The debtor answered that he had not looked into his accounts, but supposed the balance due to be between 90*l.* and 100*l.*, but he had not cash. Being pressed, he accepted a draft at four months for 60*l.*, which he did, taking an acknowledgment that he had given the acceptance on account. It was proved by other evidence that the amount unpaid for the ships' stores was 95*l.*; but the different accounts were never balanced or ascertained between the creditor and debtor.

Held, that evidence of the giving of the acceptance under these circumstances was evidence to go to the jury of a payment on account of all the debts, so as to be evidence of a fresh promise to pay what was due, sufficient to take the whole out of the Statute of Limitations.

COUNT for work and labour, and goods sold and delivered, by the intestate. Plea: set-off. Replication, except as to 2*l.* 3*s.* 11*d.*, the Statute of Limitations. Issue thereon. As to 2*l.* 3*s.* 11*d.* plaintiff remitted her claim.

On the trial, before Coleridge, J., at the last Lewes Spring Assizes, it was admitted that the intestate had done casting for the defendant to the amount of 26*l.* 9*s.* The defendant had had dealings with the intestate, and had supplied him with ships' stores. He had sent in to the intestate, at different times, seven different accounts for ships' stores supplied to different ships, amounting in the aggregate to 393*l.* These formed the particulars of his set-off; they were all before 1849. The writ in this action was issued on the 25th October, 1855. The only question was whether there was anything to take this set-off out of the

Statute of Limitations. The defendant himself gave evidence that in November, 1849, he saw the intestate and asked him for money. The intestate said he had not made out the accounts, but believed the balance due was between 90*l.* and 100*l.* *The defendant then asked the intestate to let him have 90*l.*; he said he had not the cash. [*507 After some bargaining, the intestate agreed to accept a bill for 60*l.* at four months, and asked the defendant to take out the balance in horse hire. The different supplies of ship stores were furnished on separate orders and at different times; they were never brought into one account; nor was the balance ever struck. The defendant's son, who acted as his book-keeper, proved that on the 24th November, 1849, he received from the intestate an acceptance for 60*l.* at four months, and gave to the intestate an acknowledgment that an acceptance for 60*l.* was received "on account," not stating on account of what. At that time, according to the defendant's books, 95*l.* 19*s.* 6*d.* was due on the whole accounts; and, after giving credit for the acceptance, which was duly honoured, 35*l.* 19*s.* 6*d.* still remained due. According to this evidence, the horse hire, the subject of the present action, was supplied to work out this balance. The learned Judge directed a verdict for the defendant, with leave to move to enter a verdict for the plaintiff for the amount claimed, if there was no evidence to go to the jury to take the set-off out of the statute.

Bovill, in the ensuing Term, obtained a rule nisi accordingly, on the ground that, "no balance having been ascertained, the giving of the bill for 60*l.* in November, 1849, did not take the set-off out of the Statute of Limitations."

Creasy now showed cause.—Burn *v.* Boulton, 2 Com. B. 476 (E. C. L. R. vol. 52), and Nash *v.* Hodgson, 1 Kay, 650, were cited at the trial; and the *point was reserved in deference to those cases: [*508 but, on examination, they will be found to be very different from the present. In Burn *v.* Boulton a payment was made under circumstances which showed that it was on account of a promissory note, which would otherwise have been barred by the statute. There was also a disputed claim for wages. The point decided was, that the payment, on account of the note, was no acknowledgment of the claim for wages. The Court intimate that, if it had been left in doubt whether the payment was on account of one or the other, it would not have been evidence of an acknowledgment of either. That may be so: but that question is not raised by the facts here, any more than in Burn *v.* Boulton. In Nash *v.* Hodgson three notes existed, two of which were barred by the statute, the third was not. Wood, V. C., decided that a payment of interest, generally, was not sufficiently shown to be on account of the old notes: but in giving judgment he says, "If the debtor in such a case were to say, I make this payment in respect of my debt of 200*l.* to you, and

he owed several debts, amounting, in the whole, to 200*l.*, that would be an acknowledgment of them all." The items of set-off, in the present case, were, it is true, incurred at different times; but they were all of the same kind; so that any payment on account of the debt for ship stores would be an acknowledgment from which a promise to pay what was due on the whole of that account should be inferred; but, even if they had been distinct debts, the evidence shows that the 60*l.* was given on account of a debt, formed of the whole, which the intestate admitted
*509] to *exceed 90*l.*, and which, in fact, seems to have been 95*l.* 19*s.* 6*d.* The evidence proves everything which Parke, B., in Tippets *v.* Heane, 1 C. M. & R. 252,† said was necessary to be proved. The payment was made on account of a debt; it was on account of the debt the subject of the set-off; it was as part payment of a larger debt, admitting that more was due. It is true that the precise amount of the excess was not ascertained by the parties at the time; but that is not necessary.

Bovill, contrà.—The sole question is, whether the giving of the 60*l.* bill admitted all these outstanding accounts. [COLERIDGE, J.—There was evidence that, before it was given, the intestate, speaking of these accounts, said that between 90*l.* and 100*l.* was due, and that, when asked for 90*l.*, he said he had not cash, and afterwards when he gave the bill he took a receipt for it as "on account." Is not that some evidence of an acknowledgment of the whole?] In Burn *v.* Boulton Tindal, C. J., says that, if it had been left in doubt on which of the accounts the payments were made, they could not have been applied to either. [CROMPTON, J.—He was speaking of accounts not in any way connected, so that, in common sense, an acknowledgment of one would not acknowledge the other. But it was not meant to apply to a case like that of a milkscore where the items run on.]

(Lord CAMPBELL, C. J., was absent.)

*510] COLERIDGE, J.—The rule must be discharged. The *two cases cited are clearly distinguishable; for, in both of them, the debts were perfectly distinct, so that an acknowledgment of one was no acknowledgment of the other. But here the items were of the same nature; the parol evidence shows that the parties were stating an account of them all; and, though they did not ascertain the precise balance, they agreed that more than 90*l.* was due. On account of that balance 60*l.* was paid; and that was sufficient to take the actual balance out of the statute.

ERLE, J.—The principle that the payment must be such as to be an acknowledgment of the debt is right and not new. I do not, however, by any means assent to the doctrine that, where there are two debts existing, and a payment is made, not specifically appropriated to either, there is necessarily no sufficient evidence of a payment on account of either of those debts to take it out of the Statute of Limitations. It

must depend upon the special circumstances of each case. In general, there would be evidence to go to the jury of a payment on account of both debts.

CROMPTON, J.—It was settled long ago that, where there was an acknowledgment that something was due, it was sufficient evidence of a promise to pay what might be ascertained, by other evidence, to be due. Since stat. 9 G. 4, c. 14, the acknowledgment, unless there be a part payment, must be in writing; but still the amount may be shown by parol; that was decided twenty years since in Lechmere *v.* Fletcher, 1 Cr. & M. 623.† There may very well *be cases in which [*511 there are separate debts, so unconnected with each other that an acknowledgment of one is no acknowledgment of the other; and there may be, as was supposed in Burn *v.* Bolton, 2 Com. B. 476 (E. C. L. R. vol. 52), a payment made under such circumstances as not to be evidence of an acknowledgment of the one debt more than the other: it may be that, in such a case, the party on whom the onus of proof lies to show the acknowledgment fails. But such a case can seldom happen. In general, even where the debts are quite separate, if a payment is shown it will be a question for the jury whether it was not applicable to all the debts. Rule discharged.

GEORGE DOUGLAS *v.* JOHN CORBETT. *May* 22.

In an action for a malicious prosecution for sheep stealing, it appeared at the trial that plaintiff was possessed of a sheep which defendant claimed as one of a lot stolen from him. Plaintiff gave an account of the way he became possessed of it, which, if the sheep was defendant's, must have been wilfully false. Defendant took away the sheep. Plaintiff sued him for so doing in the county court. To stop the action defendant indicted plaintiff, who was acquitted. There was evidence both ways; but it appeared that the sheep really never was defendant's, though defendant bonâ fide believed it was. The Judge, assuming these facts to be true, asked the jury if the defendant had reasonable grounds for his belief. On their finding that he had, he ruled that there was reasonable and probable cause for the indictment.

Held, by Coleridge and Crompton, Js., that, under these circumstances, the finding of the jury on that one point, in addition to the facts beyond dispute, made out a complete case of reasonable and probable cause, and, therefore, that the Judge was right.

Erle, J., dissentiente.

ACTION for maliciously, and without reasonable and probable cause, indicting plaintiff for sheep stealing. Plea: Not guilty.

On the trial, before Bramwell, B., at the last Oxford Spring Assizes, it appeared that the plaintiff was a small *farmer who, in October, 1855, had sold seven sheep. The purchaser took them soon [*512 after to Southam fair for sale; the defendant, also a sheep farmer, who was there, claimed six of these sheep as being his sheep, and parcel of a lot of ten stolen from him in September, 1855. The plaintiff, who was present, asserted that the whole seven were part of a lot of seventeen, which he had had for months, and that he still had four of the lot left at his farm, which the defendant might see. The defendant

went to the plaintiff's farm, with his shepherd and a policeman, and there saw the four sheep; the defendant and the shepherd claimed one of them, as one of the defendant's ten, and led it away; while they were taking it away, the plaintiff came up. An angry discussion ensued, the plaintiff asserting that he had bought this sheep with sixteen others in June, at Banbury fair, the defendant asserting that it was one of ten stolen from his field in September. A neighbour of the name of Good came up and was appealed to by the plaintiff: after examining the sheep, he said it was not one of the same breed as the lot of seventeen, which he knew the plaintiff had purchased at Banbury fair. The defendant thereupon drove away the sheep. The plaintiff proceeded to sue him in the county court for taking his sheep; on which the defendant laid information before a magistrate against plaintiff for felony. The plaintiff did not at first produce satisfactory evidence that he had purchased sheep at all, and was committed for trial; ultimately he was acquitted.

On the present trial, on the balance of testimony, it appeared that the sheep in question really was one of seventeen purchased by the plaintiff in June, and of course could not have been one of those stolen from the *defendant in September: but many facts were given in evidence which might have led to the conclusion that it was not one of the seventeen and was one of the ten. It appeared, *513]

however, that the defendant would not have laid information against the plaintiff, had he not been advised by his attorney to do so as the shortest way of stopping the suit in the county court. The learned Judge told the jury that the question of malice was for them, but expressed a strong opinion that they ought not, on this evidence, to find it. He told them that, as to the question of reasonable and probable cause, there seemed to be no doubt that the defendant bonâ fide believed that the sheep in question was one of those which had been stolen from him: and he asked the jury to find, as a fact, Whether the defendant had reasonable ground for that belief? The jury having found that he had, the learned Judge ruled that there was reasonable and probable cause for instituting the prosecution, and therefore that the question of malice became immaterial; and he directed a verdict for the defendant.

Keating, in the ensuing term, obtained a rule Nisi for a new trial on the ground of misdirection.

Whateley now showed cause.—The question whether there was proof of malice is immaterial if there was reasonable and probable cause. It is for the Judge to determine whether there is reasonable and probable cause; and, for that purpose, he is to take the opinion of the jury on the facts, according to the rule laid down in Panton *v.* Williams, 2 Q. B. 169 (E. C. L. R. vol. 42). [ERLE, J.—Was not the fact that the defendant made the charge only to *stop the action in the county court material in deciding whether he had reasonable and pro- *514]

bable cause, as well as being evidence of malice?] Such a fact might sometimes be material; but it was not so here. The plaintiff claimed this sheep as one of a lot of seventeen bought by him in June; a neighbour, to whom he appealed to prove this, said that it was not one of the same breed as the seventeen; if the defendant reasonably believed that this was one of the ten sheep stolen from him in September, he had reasonable ground for believing that the plaintiff was in possession of the stolen goods, and was giving a false account of the way he got possession. Therefore the Judge rightly thought that the question whether there was reasonable and probable cause or not depended on that one fact.

Keating, in support of his rule.—The learned Judge made the decision turn on the sole fact whether the sheep was like the defendant's. There were many other facts in dispute; and the rule in Panton *v.* Williams has not been reasonably complied with.

(Lord CAMPBELL, C. J., was absent.)

COLERIDGE, J.—I am of opinion that this rule must be discharged. Cases of this nature are of great importance; and the conduct of the trial is always full of practical difficulty. The Court of Exchequer Chamber, in Panton *v.* Williams, laid down a rule which, in theory, is perfect; but I believe no Judge has sat long without finding himself embarrassed in its application to *the special cases before him. [*515 In the present case, however, I think it has been properly applied. The rule is that, however complicated the facts may be on which the question of reasonable and probable cause may depend, the Judge must leave the facts to the jury, and on the facts found by them determine for himself whether there is reasonable and probable cause or not. Here there were many facts not really in controversy; one of those, the Judge thought, was that the defendant really believed that the sheep, alleged to be stolen, was one of those he had lost. By itself that would not necessarily amount to reasonable and probable cause; he might believe this; but, if he came to that conclusion rashly and inconsiderately, he was not warranted in acting on his belief. But, if he had reasonable and probable cause for his belief, that belief may be sufficient, under some circumstances, to make out reasonable and probable cause. I by no means mean that a reasonable belief that goods were stolen is in itself reasonable and probable cause for a charge of felony against a person in possession of the goods; but the other facts may be such that this is the sole circumstance wanting to complete the reasonable and probable cause. In the present case I think that the other facts were such that, if the defendant had reasonable ground for believing, and did believe, the sheep to be his, he had reasonable ground for charging the plaintiff with having stolen it. The Judge, at the trial, assumed, I think quite correctly, that there was no doubt that the defendant believed it. He did not take the opinion of the jury on every

isolated fact, but took their opinion on the only material point in dispute, namely, whether there was reasonable ground for the defendant's belief as to the identity of the property. I *understand his ruling to be that the jury were to look to all the evidence and determine that; and that, if they found there was reasonable ground for that belief, then, coupled with the other undisputed circumstances, there was reasonable and probable cause. I think, if such was his ruling, it was right, and consistent with Panton *v.* Williams. I therefore think that this rule should be discharged.

*516]

ERLE, J.—I have come to a different conclusion. I take the leading facts to be: That the plaintiff had bought some sheep in June which he kept till October. The defendant lost some sheep in September, much resembling the plaintiff's. In October, the defendant comes and claims the sheep of which the plaintiff was in open lawful possession; and then the plaintiff gave an account of the way in which he got them. The defendant nevertheless takes away the sheep; the plaintiff, who, as we must now take it, was the owner of this sheep, sues him; and to stop that action the defendant charges him with having feloniously stolen the sheep. The question was, if that charge was made with reasonable and probable cause. It seems to me that the Judge has made that question depend on the one fact, whether the defendant had reasonable ground for believing the sheep to be his. I cannot think that sufficient; if it were, I do not see what would hinder many questions of civil right being tried in criminal prosecutions.

CROMPTON, J.—The duty of the Judge was to decide whether there was reasonable and probable cause, taking *into account all the undisputed facts, and leaving the disputed material facts to the jury. Very often, it is extremely difficult, in such cases, to say which are the facts to be left to the jury. Here the Judge thought that many of the facts were not in dispute; but he doubted upon one; and as to that he took the opinion of the jury, who said there was reasonable ground for the defendant's belief that the sheep was his. That, alone, would not have been reasonable and probable cause for a charge of felony: in very many cases such reasonable belief might exist without any ground for such a charge; but we must look to the other circumstances. If this sheep was one which the defendant had lost in September, the plaintiff who asserted he had had it ever since June was giving a false account of the way he became possessed of it; and the answer of Good, who was appealed to by the plaintiff, was such as would lead the defendant reasonably to believe it was a wilfully false account. Therefore, if the sheep was the defendant's, there was, not in the abstract, but under these circumstances, reasonable and probable cause, not for concluding that the plaintiff was guilty, but for having the matter investigated. It seems to me therefore that, if the defendant had reasonable ground for his belief that the property was his, there

*517]

was, under all these circumstances, reasonable and probable cause, to him so believing, for instituting the prosecution, and therefore the Judge was not wrong. Rule discharged.

It is the well established doctrine of the American Courts that what facts and circumstances amount to probable cause is a question of law, but whether these facts and circumstances exist in the particular case is for the jury: Munns *v.* Dupont, 3 Wash. C. C. Rep. 31; Hemmenway *v.* Woods, 1 Pickering, 524; Marston *v.* Deyo, 2 Wendell, 424; Lipford *v.* M'Collum, 1 Hill, S. C. 82; Turner *v.* Walker, 3 Gill & Johnson, 377; Stone *v.* Crocker, 24 Pickering, 81; Travis *v.* Smith, 1 Penna. State Rep. 234; Weinberger *v.* Shelly, 6 Watts & Serg. 336; Nash *v.* Orr, 3 Brevard, 94; Paris *v.* Waddell, 1 M'Mullan, 358; Dodge *v.* Brittain, 1 Meigs, 84; Stevens *v.* Fassitt, 27 Maine, 266.

A party has a right to the opinion of the Court distinctly on the law, supposing that he has established to the satisfaction of the jury certain facts: Plummer *v.* Gheen, 3 Hawks, 66; Beale *v.* Roberson, 7 Iredell, 280; Bulkeley *v.* Keteltas, 4 Sanf. S. C. 450; S. C. 2 Selden, 384.

In an action for malicious prosecution, the Court may and ought to decide, when there is no question as to matters of fact, as a matter of law, whether there was a probable cause; but when there is a mixed question of law and fact, it should be left to the jury to decide: Stevens *v.* Lacour, 10 Barbour S. C. 62; Ash *v.* Marlow, 20 Ohio, 119; Carpenter *v.* Sheldon, 5 Sandf. 77.

Mere suspicion and conjecture do not amount to probable cause for a prosecution; and when the charge was larceny it is not sufficient that such circumstances existed as would cause such suspicion and belief that the party prosecuted had *taken* the article stolen—the taking of an article and the stealing not being necessarily the same thing: Stone *v.* Stevens, 12 Conn, 219. Probable cause is the existence of such facts and circumstances as would excite in a reasonable mind a belief of guilt. An opinion, however, that a given state of facts would constitute the crime, when they did not, would not furnish probable cause: Hall *v.* Hawkins, 5 Humph. 357; Faris *v.* Starke, 3 B. Monroe, 4; Hickman *v.* Griffin, 6 Missouri, 37; Merriam *v.* Mitchell, 1 Shepley, 439; Foshay *v.* Ferguson, 2 Denio, 617; Rice *v.* Ponder, 7 Iredell, 390. Good faith merely in making a criminal charge is not sufficient. There must be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party charged was guilty of the crime of which he was accused, to make out such a probable cause as will be a defence to an action for a malicious prosecution: Hall *v.* Suydam, 6 Barbour, Sup. Ct. 83; Bacon *v.* Town, 4 Cushing, 217; Jacks *v.* Stimpson, 13 Illinois, 701; Ash *v.* Marlow, 20 Ohio, 119; Long *v.* Rodgers, 19 Alabama, 321.

*518] CHARLES MOSELEY, Appellant, *v.* The Local Board of Health of the District of the City of ELY, Respondents.

Where several parishes or places separately maintaining their own highways are comprised in the district assigned to a Local Board of Health, the highways throughout the district are, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), sect. 87, to be maintained by a general district rate, and not by separate highway rates on the ancient divisions.

NOTICE of appeal against a highway rate made by the Local Board of Health of Ely having been given by Charles Moseley, the following case was stated by consent and by order of a Judge.

The city of Ely consists of the Cathedral precincts (which are reputed to be extraparochial), and the two parishes of The Holy Trinity and Saint Mary. Part of the parish of The Holy Trinity is an ancient hamlet called Stuntney, and part of the parish of Saint Mary is an ancient hamlet called Chettisham. From time immemorial the hamlet of Stuntney and the rest of the parish of The Holy Trinity have separately repaired their public highways; and separate surveyors of such highways have always been appointed for the hamlet and for the rest of the parish of the Holy Trinity: the hamlet of Chettisham, and the rest of the parish of Saint Mary, have likewise always separately repaired all their public highways, and have always separately appointed surveyors of the highways for the hamlet, and for the rest of the parish respectively. Near the centre of the city of Ely, consisting of the Cathedral precincts and two parishes aforesaid, lies what may be called the town proper of Ely, of small extent when compared with the entire
*519] area of the said city, and which town *proper consists of houses and buildings of the net annual rateable value of 12,000*l.*, or thereabouts.

The parts of the city surrounding this town proper consist of 17,000 acres, or thereabouts, of land, used almost entirely as arable, meadow, or pasture ground only, and of the net annual rateable value of 24,000*l.*, or thereabouts. By order in council, dated the 15th July, 1850, it was ordered that The Public Health Act, 1848 (except the section numbered 50 in the copies of that Act printed by Her Majesty's printer), should be applied and be in force within the entire area, places, and parts of places comprised within the boundaries of the city of Ely, in the county of Cambridge; and that such area, places, and parts of places should be and constitute a district for the purposes of the said Public Health Act, 1848, accordingly.

Under such order The Public Health Act, 1848, has been accordingly applied to the city of Ely. And The Local Board of Health for the district of the city of Ely, as surveyors of highways of the several hamlets and parts of parishes above mentioned, did, on 4th January, 1856, make four several highway rates, one for each of the said hamlets, and one for the rest of each of the said parishes, in one of

which highway rates, to wit, in the one for that part of the parish of The Holy Trinity which is not included in the hamlet of Stuntney, the said Charles Moseley is assessed on the net annual value of 246*l.* 7*s.* 6*d.* as the occupier of a farm house and lands there situate, and which farm comprises upwards of 200 acres of arable, meadow, or pasture land. Such several highway rates of the 4th January, 1856, if it be competent to the said Local Board of Health to make them, have been regularly made and published; and the *fairness of the assessment on the appellant is not disputed, if the appellant is liable, [*520 in respect of the arable, meadow, and pasture land which he occupies, to an assessment at the net annual value thereof.

The appellant contends that The Local Board of Health were bound, under sect. 88 of The Public Health Act, 1848, to raise all moneys needed for the repairs of the highways of each part of the whole district of the city of Ely by one general district rate; and that, under the proviso in sect. 88 of The Public Health Act, 1848, the said Charles Moseley, being the occupier of land used as arable, meadow, or pasture ground only, is entitled in respect of such land to be assessed, in any rate which the said Local Board can lawfully impose for the repair of highways, in the proportion of one-fourth part only of the net annual value of such land.

If the Court should be of opinion that the said Local Board of Health had no authority as such surveyors of highways to make any highway rate, but were bound to make a general district rate, and that the said Charles Moseley was therefore entitled to be assessed towards the repair of the highways, in respect of the said lands in his occupation, in the proportion of one-fourth part only of the net annual value of such lands, then the said rate to which he is assessed is to be quashed: otherwise the same is to be confirmed.

The case was argued in last Easter Term.(*a*)

Pashley, in support of the rate.—The question involved in this case is, how the repair of the highways within the district of the Board of Health is to be *provided for. If the expenses of repairing [*521 them are to be provided for by a district rate under the provisions of The Public Health Act, 1848 (11 & 12 Vict. c. 63), sect. 88, the occupiers of rural property, who in such a rate are assessed only at one-fourth of the net value of their property, are in part relieved from the burthen of maintaining their highways, at the expense of the occupiers of urban property. If the expenses are to be provided for by a highway rate, the occupiers of all kinds of rateable property will pay according to its actual value. Sect. 117, enacting "that the Local Board of Health within the limits of their district shall, exclusively of any other person whatsoever, execute the office of and be surveyor of highways, and have all such powers, authorities, duties, and liabilities

(*a*) April 19th. Before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.

as any surveyor of highways in England is now or may hereafter be invested with or be liable to by virtue of his office by the laws in force for the time being," would, if it stopped there, without doubt give the Board power to levy a highway rate: but the section goes on: "except in so far as such powers, duties, or authorities are or may be inconsistent with the provisions of this Act." And the appellant's contention will no doubt be that levying a highway rate is inconsistent with the provisions of the Act. There is a minor point, whether, supposing that the rate is to be on the principle of a highway rate, and equally assessed on all property, it ought not to be one rate on the entire district, instead of being, as here, a separate rate on each of four of the five old divisions comprised in the district. If that were so, it would alter the onus of repairing the highways by making the inhabitants of the whole district jointly liable for the whole, instead of being liable in separate
*522] portions for the roads *in those portions severally. The change would not be so great as if the nature of the rate were changed; but there is nothing in the object of the Act to make it probable that the Legislature intended to change the liability to repair the highways at all, and no words rendering it obligatory on the Court so to construe the Act. In Hanson *v.* Epsom Local Board of Health, 5 E. & B. 599 (E. C. L. R. vol. 85), the decision of this Court was that the highways might be provided for by a highway rate. There the district was conterminous with the parish, so that the minor question, whether there was to be one highway rate or several, did not arise; but the case affirmed the principle, that what was to be done by the Local Board, in the capacity of surveyor of highways, was to be defrayed by a rate levied on the principle of the highway rate. If that be so, the mode of laying on that rate should be by the surveyors in each parish, unless there be clear words to alter the incidence of the burthen. The Local Board and no others are to be surveyors within the district; but they may well be surveyors divisim in each entire parish within that district. Where the district consists of fragments of parishes, as in Regina *v.* Worthing Road Trustees, 3 E. & B. 989 (E. C. L. R. vol. 77), ex necessitate they can only be surveyors of the district. But Elmer *v.* Norwich Local Board of Health, 3 E. & B. 517, is, no doubt, a decision on both points in favour of the appellant in this case. It is however in direct conflict with Hanson *v.* Epsom Local Board of Health on the main question; and, if overruled upon that, its authority is shaken on the other. [CROMPTON, J.—I suppose you do not admit that the repair of highways is to be defrayed out of the district fund account; though,
*523] by *sect. 117, the surplus, if any, of the funds of the former surveyors is to be carried to that account.] By sect. 87 the district fund is applicable to defraying such expenses "as are not provided for by any other rate." If the highways are provided for by a highway rate, they are not chargeable on the district fund. When the

old surveyors' establishments were wound up, it was necessary to dispose of the surplus in some way. It is given to the district fund: but that does not show that the district fund is to defray the expenses.

Watson, for the appellant.—The Local Board are made, by sect. 117, sole surveyors of highways within their district. If by this the Act meant, in such a case as the present, to make them fill four separate offices as surveyors of four distinct divisions, different words would be used, and some provision would be made for keeping separate accounts for each division. But if they are surveyors of the highways for the whole of that one district no such provisions are required. Again, if the Board were in their capacity of surveyor of highways to levy a highway rate over the entire district, or separate highway rates for each division in the district, it would be necessary to keep separate the highway funds from the district funds. Instead of this being directed, the surplus of the old highway funds is, by sect. 117, carried to the district fund. By sect. 87 the district fund is to be applied to the expenses incurred by the Board "not otherwise expressly provided for:" the utmost extent of the argument for the respondents has been that the old mode of providing for the highways has not been expressly taken away. But the expenses which the Local Board are bound to incur *in respect of highways are not merely those which the parishes had to incur. They include the expenses of keeping up the [*524 streets, and the pavements; sect. 68: and it would be a great change, to the detriment of the occupiers in rural parts of the district, if such occupiers were to be rated for keeping up those. It is true that Hansom *v.* Epsom Local Board of Health, 5 E. & B. 599 (E. C. L. R. vol. 85), decides that they are so liable; but Elmer *v.* Norwich Local Board of Health, 3 E. & B. 517 (E. C. L. R. vol. 77), decides the contrary. It is sufficient for the decision of this case, if the Board are surveyors, not for each separate parish, but for the whole district. On that there is no conflict of authority.

Pashley was heard in reply. *Cur. adv. vult.*

Lord CAMPBELL, C. J., in this Term (June 6th), delivered judgment.

This was an appeal against separate highway rates for separate parishes within the district of the Board of Health for the city of Ely, for the repair of the highways in each of those parishes. And the appellant contended: 1st, that the district of a Board of Health is one entire district for the repair of all the highways therein; and 2dly, that the money needed for such repair must be raised by a general district rate, and not by a highway rate.

Both of these questions were under the consideration of this Court in Elmer *v.* Norwich Local Board of Health and Regina *v.* Worthing Road Trustees, 3 E. & B. 989, and answered in the affirmative. The matter was partially under the *consideration of the Court again in [*525 Hansom *v.* Epsom Local Board of Health, where it was decided

in the case of a district conterminous with a parish which had repaired its own highways, that the repair should be paid for by a highway rate. Although the district of the city of Ely consists of several parishes, still the respondents rely on the last decision, and contend that, as a district rate is charged on property in a different proportion from a highway rate, and as no intention to make a change in the burden on property is expressed in the Act, and as a Board of Health has all the powers of surveyors of highways except when inconsistent with the provisions of the Act, therefore the expense of repairing highways should be paid for as before by a separate rate for each place separately maintaining its own highway. But it seems to us, on reviewing the decisions, that the appellant is right, and that the true construction of the Act was given in Elmer *v.* Norwich Local Board of Health, 3 E. & B. 517, confirmed by Regina *v.* Worthing Road Trustees. The 88th section subjected urban property to be rated to the general district rate at its full value, and rural property to be so rated at one fourth of such value; and the question is, did the Legislature intend so to shift the burden of repairing the highways within a district of a Board of Health? By section 68 all present and future highways in a district, and all things belonging thereto, are vested in and placed under the management of the Board of Health, which Board is to level, pave, flag, channel, alter and repair, and raise and lower them, and put and keep in

*526] repair fences and posts for them as occasion may require; *and, by sects. 69 and 70, the Board may take new streets in certain cases, and fit them for town traffic, and make them highways. These powers and duties, which are far beyond the mere repairing of highways, are blended with the duty of repair, and are all to be performed by one Board. If a highway was levelled, channelled, flagged, and repaired, it would be impossible to settle with certainty how much of the total expense of the process was extra that of mere repair; but this would be necessary if repair was to be paid for out of the highway rate, and the rest out of the district rate. By section 87 all expenses of executing the Act, not otherwise provided for, are laid on the district fund: and so the expenses of repairs of highways would be laid on the district fund, unless it can be shown that they are otherwise provided for; and they are not so provided for, unless it be by section 117, by which the Board is made surveyor of highways, with all the powers of surveyors not inconsistent with the Act. Then, would the making a separate highway rate for the repair of the highways in each separate district be inconsistent with the Act? We think that it would. The duty of repair is blended with other operations as above explained; the district fund is certainly charged with the expense of the repair, unless it is excepted by section 117; but there are no words therein referring to a highway rate for repair: on the contrary, it expressly orders the surplus from any existing highway rates to be paid to the district fund, which is entirely inconsistent

with an intention to continue highway rates as before. The words giving the powers of surveyors to the Board would have abundant effect if applied to powers to get materials, to abate nuisances, and to do things of the like description. *Moreover, the general purpose of the Act is distinctly urban. The preamble states an intention to make provision for improving the sanatory conditions of towns and populous places; and, by the provisions of the Act, air is to be purified, water supplied, and the earth's surface to be cleared so as to be suitable for a dense urban population. The generic name for highways within the Act is "streets;" and most of the processes specified in connexion with repair are adapted to the streets of a town, &c. The improvements which are to be made in the highways are profitable to townsmen and useless to rustics, so that there seems to have been abundant reason for Parliament, when imposing a new burden, to lay it on those who had the new benefit. All the expense on highways beyond what would fit them for farm work would be useless to the rustic; and such repair as he would require would be insignificant in comparison with the process required for a well constructed street. If the mere use alone is taken into the account, the traffic required for every acre covered by town houses over the adjoining arable acre, would exceed the traffic required for an arable acre over the adjoining town acre, by much more than four fold. With respect to the other point first above mentioned, it is clear from the tenor of the Act that the district is made one district for all the purposes of the Act; it is to be controlled by one management, and to contribute to one fund. This purpose appears in the preamble, which recites the expedience of placing the supply of water, the sewerage, drainage, cleansing and paving of towns and places, under one and the same local management and control. It pervades the whole Act, as above shown; and, if occasion should be for the Board to act as *surveyor of highways and levy a highway rate, as, for example, for contribution to a turnpike road within the district, they would have to rate the whole district as one district, and would have no power to resort to the original places and parts of places maintaining their own highways as separately liable; Regina *v.* Worthing Road Trustees, 3 E. & B. 989 (E. C. L. R. vol. 77).

[*527

[*528

Judgment for the appellant

WILLIAM REYNOLDS *v.* STEPHEN FRANKLIN BRIDGE.

May 26.

Deed between plaintiff and defendant recited that plaintiff and defendant had carried on the business of surgeons and apothecaries in partnership in W.: and each covenanted that the business should thereafter be carried on under the style of the old firm for three years, but should be the exclusive business of plaintiff: then followed other covenants to be performed by plaintiff and defendant respectively: and then a covenant that, after the determination of the three years, and so long as plaintiff should reside in W. or within twelve miles thereof, defendant should not practise the business of a surgeon or apothecary, or see any patients, except as thereafter mentioned, nor assist nor introduce any other medical man in W. or within twelve miles thereof, but should, before the expiration of the three years, introduce plaintiff to all such persons as might be the exclusive patients of defendant, and, during the term of three years, use his best endeavours to secure the same for plaintiff after the expiration of the three years; provided that, in case defendant should make default in the observance and performance of the covenant lastly mentioned, defendant should forthwith pay to plaintiff 2000*l.*, but not in the nature of a penalty, but as ascertained liquidated damages: but that defendant might, after the determination of the three years, act in consultation with other medical gentlemen in W. and elsewhere, and might also, if he thought fit, after the determination, &c., attend midwifery cases in W., the fees for which should be equal to or exceed 1*l.* 1*s.*; but he should pay one half of the fees he should receive for each of such midwifery cases to plaintiff, so long as plaintiff should continue to practise at W. That, in case either party should make default in performance of any covenant, he should pay to the other 500*l.*, as and for liquidated damages, and not in the nature of a penalty. Defendant committed a breach by practising contrary to the covenant.

Held, that the 2000*l.* was recoverable as liquidated damages, no one of the provisions of the covenant to which it applied being such that the damage for the breach of it was capable of precise estimation; the provision as to the payment of the half fee not being a part of such covenant, but collateral to it.

THE declaration recited that heretofore, to wit, 10th December, 1852, by an indenture, then made *between defendant of the one part and plaintiff of the other part, after reciting (amongst other things) that defendant and plaintiff had, since 1st April, 1847, carried on the business of surgeons and apothecaries in partnership in Wellington in Somersetshire, for the term and under the conditions in that indenture mentioned: It was witnessed that each of them, defendant and plaintiff, so far as the covenants and agreements therein contained and hereinafter mentioned were to be observed or performed by him, his heirs, executors, or administrators, did thereby, for himself, his heirs, executors, and administrators, covenant with the other of them in manner following, that is to say (amongst other covenants): that the said practice or business should be carried on at Wellington aforesaid, under the style or firm of Bridge & Reynolds, for the term of three years from 6th August, 1852, if both of them should so long live: but that the said practice and business should belong to, and be the exclusive property of, the plaintiff, subject nevertheless to the payments to defendant therein mentioned: That the dispensing part of the said business should be carried on at the dwelling-house of plaintiff, or at such other place or places in Wellingtonas he should at any time during the said three years determine: that both defendant and plaintiff would, during the said term of three years, diligently employ himself in such business, or carry on the same to the greatest advantage: That an account of all business done and all transactions relating thereto should be daily charged and

*529]

entered by each of the said parties in proper books, to be kept for that purpose, in such manner as was usually done by persons of the same profession, and that a fair and clear account of *the said practice [*530 or business and the true state thereof might appear; and, in particular, that a book should be kept by each of the said parties for the entries of all moneys and cash to be received by each of them on account of the said practice or business, wherein all such receipt of money and cash should be daily entered from time to time. That each of the said parties would, from time to time and at all times during the continuance of the said term of three years, be just and true to each other in all their accounts, dealings, and transactions relating to the said practice and business, and would give and render to the other of them a just and faithful account of same when reasonably required so to do: That, after the determination of the said term of three years, and so long as the plaintiff should reside in Wellington or within twelve miles thereof, defendant should not practise or carry on, either directly or indirectly, by himself or by any partner, apprentice, or assistant, the profession or business of a surgeon or apothecary, or see any patients (except as thereinafter and hereinafter mentioned), nor assist or introduce any other medical man in the town of Wellington or within twelve miles thereof, but should, before the expiration of the said term of three years, introduce the plaintiff to all such persons as might be the exclusive patients of the defendant; and should also, during the said term, use his best endeavours to secure the same for the plaintiff after the expiration of such three years: Provided always, and it was thereby expressly agreed and declared, that, in case defendant should make default in the observance or performance of the covenant lastly thereinbefore contained and herein mentioned, defendant should forthwith pay unto plaintiff the sum of 2000*l.*, *"but not in the [*531 nature of a penalty, but as ascertained liquidated damages:" That, notwithstanding the clause lastly thereinbefore contained and hereinbefore mentioned, the defendant might, after the determination of the said term of three years, act in consultation with other medical gentlemen in the town of Wellington and elsewhere: That defendant might also, if he thought fit, after the determination of the said term of three years, attend midwifery cases in the town of Wellington and within twenty miles thereof, the fees for which should be equal to or exceed the sum of 1*l.* 1*s.* That, in case either of them should make default in the due observance and performance of all and every the clauses, covenants, conditions, articles, and agreements therein contained, either of them, the defendant and plaintiff, should pay unto the other of them the sum of 500*l.*, as and for liquidated damages, and not in the nature of a penalty. As by the same indenture at large appears.

Averment: that, although plaintiff from the time of the making of

that indenture hitherto has always been ready and willing to observe, &c., and hath observed, &c., all things therein contained on his part to be observed, &c., and although all things have been done and suffered, and have happened, to entitle plaintiff to commence and prosecute the action in respect of the several breaches and causes of action herein mentioned: Yet defendant hath broken his said covenants in manner following, that is to say: &c. The declaration then, after alleging three breaches of earlier covenants, averred, as a fourth breach: "That, after the determination of the said term of three years, and so long as plaintiff resided in Wellington, and within twelve miles thereof, defendant practised and carried on, directly and indirectly, by himself

*532] *and by assistants, the profession and business of a surgeon and apothecary, and saw patients otherwise than as in the said indenture is excepted, and assisted and introduced other medical men in the town of Wellington and within twelve miles thereof; and, before the expiration of the said term of three years, would not introduce plaintiff to all or any such persons as might be and were the exclusive patients of defendant; and did not also, during the said term, use his best endeavours to secure the same to plaintiff after the expiration of such three years: And, although defendant has made default in the observance or performance of the covenants lastly hereinbefore mentioned, he hath not forthwith paid unto plaintiff the sum of 2000*l.*, or any part thereof. And the plaintiff avers that the several breaches herein assigned do not relate to the defendant, after the determination of the said term of three years, acting in consultation with other medical gentlemen in the town of Wellington aforesaid or elsewhere, nor to the said defendant, after the determination of the said term of three years, attending midwifery cases in the town of Wellington aforesaid and within twenty miles thereof, the fees for which were equal to or exceeded the sum of one guinea. And, although the defendant in manner aforesaid hath made default in the due observance and performance of the clauses, covenants, conditions, articles, and agreements as aforesaid, he hath not paid the plaintiff the sum of 500*l.*, or any part thereof."

The indenture was set out verbatim in the pleas. It contained many clauses not set forth in the declaration: but the only addition material to the question here decided was that the provision permitting the

*533] defendant to practise *midwifery appeared to be as follows: "That the said Stephen Franklin Bridge may also, if he thinks fit, after the determination of the said term of three years, attend midwifery cases in the town of Wellington aforesaid, and within twenty miles thereof, the fees for which shall be equal to or exceed the sum of one pound one shilling: but he shall pay one-half of the fees which he shall receive for each of such midwifery cases unto the said William Reynolds so long as the said William Reynolds shall be alive and shall

continue to practise his said profession at Wellington aforesaid: but the fees for any midwifery cases that the said Stephen Franklin Bridge may attend at a greater distance than twenty miles from the town of Wellington aforesaid shall belong exclusively to him."

Plea 4, to the fourth breach: That defendant did not, after the determination of the said term of three years, and so long as the plaintiff resided in Wellington aforesaid, or within twelve miles thereof, practise or carry on, directly or indirectly, by himself or by assistants, the profession and business of a surgeon or apothecary, or see patients otherwise than in the said indenture is excepted, or assist to introduce other medical men as alleged: and that he, the defendant, did, before the expiration of the said term of three years, introduce the plaintiff to all and every such person and persons as might be and were the exclusive patients of the defendant; and the defendant did also, during the said term, use his best endeavours to secure the same to the said plaintiff after the expiration of such three years, according to his covenant in that behalf.

Issue was taken on this plea, and on several others not important to the question afterwards discussed.

*On the trial, before Channell, Serjt., at the last Somersetshire Assizes, the jury found a verdict for the plaintiff on all the issues. The learned Serjeant expressed an opinion that the damages were liquidated by the terms of the indenture; the jury, however, under the directions of the learned Serjeant, finding what they considered to be the damages actually sustained in respect of the several breaches, which they assessed at 1200*l.* The verdict was entered for 2500*l.* with leave to move to reduce it to 1200*l.* [*534

In last Term, *Collier* obtained a rule for a new trial, "on the ground of misdirection of the learned Judge on the subject of the penalty," "and also on the ground of the damages being excessive on each of the breaches." The rule was obtained on several other grounds; but, upon the argument in banc, at the suggestion of the Court and by the assent of counsel, it was arranged that the claim of the plaintiff should be limited to the 2000*l.*, on the fourth breach; and that the only question to be discussed should be whether the 2000*l.* named was in the nature of liquidated damages or of a penalty.

Kinglake, Serjt., *Montague Smith*, and *Coleridge* now showed cause.(*a*) —This is a case of liquidated damages. The indenture contains one class of covenants, consisting of such as might be broken by either party; but that for the breach of which the 2000*l.* has been given is unilateral, not mutual, and could be broken only by the defendant. The language of the deed is express as to making the 2000*l.* liquidated damages, and not a penalty. It is true that the language was equally

(*a*) Before Coleridge, Erle, and Crompton, Js.

*535] strong *in Kemble *v.* Farren, 6 Bing. 141 (E. C. L. R. vol. 19), where the damages were not considered as liquidated. But there the agreement contained several stipulations, some of which were capable of assessment; and, as the sum named was to be paid on the breach of any one, the Court held that it could not be given as liquidated damages for any, the language of the agreement not permitting any distinction. Here the covenant to which the sum of 2000*l.* relates contains nothing capable of assessment. [COLERIDGE, J.—I think Lord Tenterden had expressed an opinion that there could be no liquidated damages, no matter what the parties said.(*a*)] The present case is like that of Galsworthy *v.* Strutt, 1 Exch. 659,† where the covenant was that defendant would not carry on business as an attorney within a certain district; and would, if he infringed that covenant, pay "1000*l.*, as and for liquidated damages, and not by way of penalty:" and this was held to be a case of liquidated damages. In Beckham *v.* Drake, 8 M. & W. 846,† in Exch.,(*b*) it was held, on the authority of Kemble *v.* Farren, that the damages were not liquidated, by reason, it seems, of the number of stipulations, of different degrees of importance, to which the clause applied. Horner *v.* Flintoff, 9 M. & W. 678,† was a similar

*536] case. In Green *v.* Price, 13 M. & W. 695,† in Exch.,(*c*) *the covenant which was held good was that the defendant would not exercise a certain trade within London and Westminster; for the observance of which the defendant bound himself to pay "5000*l.*, as and by way of liquidated damages, and not of penalty." There the damages were held to be liquidated; and Parke, B., with reference to Kemble *v.* Farren, 6 Bing. 141 (E. C. L. R. vol. 19), said: "The principle is, that, although the parties may have used the term 'liquidated damages,' yet if the Court can see, upon the whole of the instrument taken together, that there was no intention that the entire sum should be paid absolutely on non-performance of any stipulations of the deed, they will reject the words, and consider it as being in the nature of a penalty only. In Kemble *v.* Farren there was a stipulation that the plaintiff should pay the defendant 3*l.* 6*s.* 8*d.* during every night that the theatre should be open for performance; and the object of the deed was to secure the defendant's performance regularly; and there the Court rejected the words 'liquidated damages,' because it was absurd to suppose that the parties intended the whole sum of 1000*l.* to be payable by the plaintiff, if he once omitted to pay the defendant his 3*l.* 6*s.* 8*d.* But here there is a distinct agreement by the defendant to pay

(*a*) The reference is probably to Randal *v.* Everest, Moo. & M. 41. Abbott, C. J., there expressly confined his opinion to instruments not under seal.

(*b*) Reversed, on error, in Exch. Ch.; Drake *v.* Beckham, 11 M. & W. 315.† The judgment of the Exchequer Chamber was affirmed in Dom. Proc.; Beckham *v.* Drake, 2 H. L. Ca. 579. The question whether the sum was a penalty or liquidated damages was not involved in the decisions in error.

(*c*) Affirmed, on error, in Exch. Ch.; Price *v.* Green, 16 M. & W. 346.†

the sum of 5000*l*., if he sets up in business in any place within the prohibited limits. The parties stipulate, in cases of this kind, for the payment of a certain sum of money absolutely, from the difficulty of ascertaining the precise amount of the damage they may suffer from a breach of the covenant." Those remarks apply exactly to the present case. Atkyns *v.* Kinnier, 4 Exch. 776,† is directly in point. The defendant there *covenanted not to practise as a surgeon, without plaintiff's consent, within a specified district, nor prevail on [*537 patients to withdraw from plaintiff or employ any medical attendant in prejudice to plaintiff, and that he would in all things endeavour to promote the business of plaintiff in the profession of a surgeon; "and that, if the defendant should in any respect break or infringe this stipulation, then and in such case he the defendant should immediately thereupon pay to the plaintiff, his executors or administrators, the sum of 1000*l*. as and for liquidated damages, and not by way of penalty." This was held to be a case of liquidated damages; and Parke, B., explained Kemble *v.* Farren much as before, saying, however, that he could not help thinking that the rule of law was there "somewhat stretched." In Atkyns *v.* Kinnier, as here, there were various provisions, but all comprehended in the single covenant. The liquidated damages are applicable to each provision. If the covenant was broken at all, the 2000*l*. was to be paid. [CROMPTON, J.—On that view, I suppose the remaining provisions might be broken with impunity.] In note (*d*) to Gainsford *v.* Griffith, 1 Wms. Saund. 58 c, it is said: "The law, nevertheless, remains unshaken, that parties may, by their mutual agreement, settle the amount of damages, *uncertain in their nature*, in respect of the performance or omission of *a particular specified act*, at any sum upon which they may agree; and such sum may be recovered as liquidated damages."

Collier, *E. W. Cox*, and *Karslake*, on a later day in this Term (May 26th), were heard in support of the *rule.—It is true that Parke, [*538 B., in Atkyns *v.* Kinnier, 4 Exch. 776,† intimated a suspicion that Kemble *v.* Farren, 6 Bing. 141 (E. C. L. R. vol. 19), went too far; but he added: "That decision has been acted on in several cases, and I do not mean to dispute its authority." It has never been overruled; and it is fully authorized by the earlier case of Astley *v.* Weldon, 2 B. & P. 346, which is unquestioned law. It should be observed that in the judgment in Kemble *v.* Farren, Tindal, C. J., said: "It is, undoubtedly, difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of 1000*l*. should be taken as liquidated damages, but negatively also that it should not be considered as a penalty, or in the nature thereof." The question is, as laid down in Galsworthy *v.* Strutt, 1 Exch. 659,† as to the intention of the parties to be collected from the nature of the covenants to which the stipulation as to amount

appears to refer. It is clear that, if there had been in Atkyns v. Kinnier a single stipulation for the breach of which the damage could be estimated, the damages would have been held not to be liquidated by the sum named, if it was referred by the covenant to that stipulation among others. Now here the covenant in question contains stipulations that the defendant shall not see any patients within the district, excepting midwifery cases in which the fee should amount to at least 1*l.* 1*s.*; and in those cases the defendant is to pay to the plaintiff half the fees which he receives. The damages for a breach of this covenant are directly estimable. If the damages were liquidated, the defendant
*539] might be called on to pay 2000*l.* for the *non-payment of half a guinea. [CROMPTON, J.—I doubt whether, as that last covenant is placed, the breach of it would be within the 2000*l.* clause.] It would be so as much as any other breach: the covenant is not to practise except in certain midwifery cases in which he will pay half the fees: if he practises in such cases without paying the half fees the exception is inapplicable, and the covenant is broken. Indeed the argument on the other side insists on the entirety of the covenant. [CROMPTON, J.—Can his practising become a breach by relation, on his not paying the money?] The general doctrine is discussed at much length in Sedgwick On the Measure of Damages, ch. xvi., where both English and American authorities are collected. The rule is thus laid down in the note at page 446 (Ed. New York, 1847), from a decision of the Courts of Alabama. "Where articles covenant for the performance of several things, and stipulate for the payment of a sum in gross in the event of a breach, the sum expressed will be regarded as a penalty; and if the parties would stipulate the damages in such a case, they should express the sum to be paid on each distinct breach."

(Lord CAMPBELL, C. J., was absent.)

COLERIDGE, J.—I am of opinion that this rule should be discharged, and that the sum named is liquidated damages by the agreement of the parties. The question arises on the covenant, which I will read as written, not forgetting the argument urged from the exception. (His Lordship then read the covenant, from "That after the determination" to "expiration of such three years.") Then follows the proviso: Pro-
*540] vided always, and it was thereby *expressly agreed and declared, that in case the defendant should make default in the observance or performance of the covenant lastly thereinbefore contained and herein mentioned, defendant would forthwith pay unto the plaintiff the sum of 2000*l.*, "not in the nature of a penalty, but as ascertained liquidated damages." Now, throwing for the moment the exception out of the question, this is a covenant for the performance or non-performance of several things; and the damages resulting from a breach in every instance must be uncertain, whether they arise from doing what the covenant forbids or not doing what the covenant requires. What then

is the principle established by the cases? I think there is no great disagreement among the authorities, as to the instances in which the sum named is to be considered constituting liquidated damages or a penalty. All that the Courts have done has been only to lay down a canon for establishing the intention of the parties. In no case is it said that the question can be determined from the circumstance that the sum named may very often be an exaggerated estimate of the actual damage. In Astley *v.* Weldon, 2 B. & P. 351, Lord Eldon distinctly laid down that the mere magnitude of the sum named could not prevent it from being liquidated damages. Another rule has been suggested, that, where the sum is to be paid for the breach of an agreement comprehending more than one stipulation, it shall not be taken for liquidated damages. That is certainly found in some cases: but it cannot be said to be law now; in Kemble *v.* Farren it was clearly laid aside; Tindal, C. J., saying: "if the clause had been limited to breaches which were of an uncertain *nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at 1000*l.*" So in Atkyns *v.* Kinnier, 4 Exch. 776,† we find the same doctrine. But the principle seems to be, that, if you find a covenant the breach of which will occasion a damage, not uncertain, but such as is capable of being ascertained, as where there is a particular sum to be paid which is much less than the sum named as payable upon the breach, there it is held that the last-named sum is specified by way of penalty, because a Court of equity would limit the amount to be actually paid. Then comes the case where there are several provisions, the breach of some of which will produce an ascertainable damage, but the breach of others an uncertain damage. In that case (though we do not require to determine it now), inasmuch as there is one provision in respect of which the sum named cannot be taken as liquidated damages, it cannot be so taken for any provision; for, if it could, the contract would mean liquidated damages in one case and not in another. If you look at the judgments of Tindal, C. J.,(*a*) and Parke, B.,(*b*) they seem rather to contemplate the case where all the provisions are of one kind: Parke, B., says: "if there be a contract consisting of one or more stipulations, the breach of which," meaning, I think, of each of which, "cannot be measured, then the parties must be taken to have meant that the sum agreed on was to be liquidated damages and not a penalty." On this principle, if there were no more in the covenant than what I have read, this would clearly be a case of liquidated damages. But then it is argued that this covenant does *contain a provision, the breach of which is estimable in damages, it being qualified by the words "except as thereinafter and hereinafter mentioned;" and afterwards comes the exception, which authorizes the defendant to practise midwifery where the fees amount to as much as 1*l.* 1*s.*, "but

[*541

[*542

(*a*) 6 Bing. 147 (E. C. L. R. vol. 19). (*b*) 4 Exch. 782.†

he shall pay one half of the fees which he shall receive for each of such midwifery cases unto the" plaintiff, so long as the plaintiff shall be alive. It is said that for any one breach of this provision the defendant, taking the damages as liquidated, might be called upon to pay 2000*l.*, and this, putting the instance as a proof of the absurdity of the result, for a non-payment of a single half guinea: and that therefore the 2000*l.* must be in the nature of a penalty, not of liquidated damages. I should not yield to the argument suggested from the mere disproportion of the sums: there must be a line drawn somewhere; and a man who goes a hair's breadth beyond it brings himself within the stipulation. In a general covenant not to practise within a certain distance of a spot named, the difference may be so small as to produce an appearance of hardship, as if, for instance, the covenantor practised one yard within the distance named. But that is not the main question: the question is whether this forms part of the covenant. It is a part of that which is excepted from the covenant. The very notion of an exception is this: you shall do certain things in a certain way: still there are some of those things which you may do in another way. Here, had there been an attempt to recover the 2000*l.* on the ground that the defendant, having practised in a midwifery case where the fee exceeded a guinea, had not paid over the half to the plaintiff, the attempt must clearly have failed. *On these grounds I think that the rule should be discharged, and that the verdict should stand for 2000*l.*

*543]

ERLE, J.—The defendant, upon entering on an arrangement with plaintiff, covenants with him that, after the expiration of three years, he will not practise as a surgeon, except in a limited manner. It is found that he has broken this covenant. It is stipulated that, if he does break the covenant, he shall pay 2000*l.* The question is, whether he is to pay that sum. In very clear language, he has expressed that he will do so. From the nature of the contract, the damages for the breach of it are clearly undefined: it is impossible, on ascertaining the fact that any one or more breaches have been committed, to say with certainty what damages have resulted: they might be the loss of a fortune, or only the loss of the amount of a particular bill. They are therefore undefined; and it is clear that in such case the covenantee is to have the 2000*l.* But it is said that there is a rule of construction according to which, when the stipulations are of a particular kind, the stipulation for payment of the sum named counts for nothing, and the Judges presume that the parties meant only to make the contract generally, and the words expressing that a sum named is to be paid as liquidated damages are merely formal. No doubt there may be such a contract in law. If a man borrows 100*l.* upon the security of a money bond for 200*l.*, from early times relief would be given upon payment of interest and principal. That has been also carried out in the case

of covenants, where the payment of wages, or other sums certain, is covenanted for, and a large sum named is made payable upon a breach. The courts have *extended the above-mentioned rule of construction to such a case, saying that the naming of the large sum means only that so much shall be paid as is actually due. The direction of later decisions has rather been to restrict this rule, which indeed supersedes an important principle of law, that parties are to assign such limits as they please to their own liability. If parties choose to lay down such a limit, I do not see why the Judges are to substitute another; and the tendency latterly has been very much to restrict the rule of construction. Certainly in some of the cases it was a very large exercise of the power of the Court, to say, we will see what we should have thought reasonable, and to construe the contract accordingly: and later cases, ending with Atkyns *v.* Kinnier, 4 Exch. 782,† tend the other way: it was a very strong absurdity, as it seems to me, when a party had said, I know to what extent I can perform and I will pay so much if I do not perform, to say that upon his non-performance he should not pay so much. If the Courts can limit the contract one way they might limit it the other; and then a party might have to pay a larger sum than he ever meant to pay. The damages are here, I think, indefinite; and the parties have expressed the sum which ought to be paid. It is said, however, that a part of the covenant is to pay half of the fees received in particular cases. But that is not a part of the covenant in respect of which the liquidated damages are agreed upon: that covenant is, not to practise: it was quite collateral to that to agree that, if the defendant received certain money he should pay a part to the plaintiff; in the case of non-payment of that, the plaintiff would have a right of action, but not for the 2000*l.* [*544

*Crompton, J.—I am of the same opinion. There have been many decisions on this question; and perhaps they are a little conflicting; but I apprehend that no decision ever went so far as to say that the Courts would not follow what they considered to be the meaning of the parties. The question is, whether the case is to be governed by Kemble *v.* Farren, 6 Bing. 141 (E. C. L. R. vol. 19), or whether Atkyns *v.* Kinnier, 4 Exch. 776,† is not exactly like this. Clearly this is all one covenant: the plaintiff is to get into practice, and the defendant is not to interfere: the whole is one matter: it is not like what we find in some of the old cases where damages are stipulated for severally in respect of several breaches, as for not ploughing land, and so on. This belongs to another class of cases, where there are not distinct penalties for each breach, but, by the agreement, if the covenant is once broken as to any provision which it contains, the whole is at an end, the liquidated sum is to be recovered, and there can be no recovery in respect of anything which occurs afterwards. We must hold this to be such a case, and to be liquidated damages, unless [*545

we are prepared to overrule Atkyns *v.* Kinnier, which I do not see how to distinguish. The defendant's counsel appear to admit that the case is within the authority of Atkyns *v.* Kinnier, unless we can read the clause containing the exception as part of the covenant. I might perhaps have wished to consider some of the expressions used in Atkyns *v.* Kinnier as to the cases where the covenant is partly for payment of a specific sum: but the point does not arise here. The object of this covenant is merely to secure the practice. I do not think that this *covenant would be broken if the defendant attended a midwifery case for a fee of 1*l.* 1*s.* and failed to pay half the fee to the plaintiff. This covenant is broken only by practising in a case not within the exception: the covenant to pay half the fee in the excepted case is a distinct covenant. If indeed the defendant practised in a midwifery case where the fee was less than 1*l.* 1*s.*, that would, I think, be a breach of the covenant on which the breach is assigned, because that would not be within the exception, and the covenant is not to practise in any case not within the exception. But the non-payment of the half fee is not a breach of that covenant: the case therefore is not taken out of the authority of Atkyns *v.* Kinnier.

*546]

Rule discharged.

The QUEEN, on the prosecution of JOSEPH DITCHER, Clerk, *v.* The Most Reverend JOHN BIRD, Archbishop of CANTERBURY. *May* 26.

On the application of a clerk holding a benefice in the diocese of B., in the province of Canterbury, complaining that a clerk holding preferment in the same diocese had published, in the same diocese, doctrines contrary to the Articles of the Established Church, the patronage of the preferment being in the Bishop of B., the Archbishop of Canterbury, under the provisions of stat. 3 & 4 Vict. c. 86, ss. 3, 24, issued a commission, which reported that there was sufficient primâ facie ground for instituting further proceedings.

Held that, the complainant thinking fit to proceed against the party accused, the Archbishop was bound, under sects. 9, 11, to require the appearance of the party complained against, and to hear the cause and pronounce sentence, and had no discretion in the matter.

And that the appearance and hearing ought to be within the diocese of B., and not in any place without such diocese, though within the province of Canterbury.

SIR FITZROY KELLY, in last Michaelmas Term, obtained a rule calling on his Grace the Archbishop of Canterbury to show cause why a mandamus should not *issue, commanding him "to require, by writing under his hand, the Venerable George Anthony Denison, Archdeacon of Taunton and Vicar of East Brent, in the county of Somerset, in the Diocese of Bath and Wells, to appear, either in person or by his agent duly appointed, before him, at a time and place therein named, according to the provisions of the statute of the 3d and 4th Victoria, chapter 86; and further to proceed in the matter, in the said affidavits mentioned, of the charge or complaint of the said

*547]

Reverend Joseph Ditcher against the said Archdeacon Denison according to law." On notice to the Archbishop and the Archdeacon.

The following facts appeared on affidavit.

The Venerable George Anthony Denison is a clerk in holy orders, of the United Church of England and Ireland, Archdeacon of Taunton, and vicar of East Brent in the county of Somerset, in the diocese of Bath and Wells, and in the province of Canterbury. The patronage of the archdeaconry and vicarage belongs to the Bishop of Bath and Wells in right of his see. On 7th August, 1853, 6th November, 1854, and 14th May, 1854, respectively, the Archdeacon preached three sermons in the cathedral church of Wells, which he afterwards caused to be printed and published; wherein and whereby (as suggested in the affidavit) he advisedly maintained and affirmed doctrine contrary to certain of the Articles of religion of the United Church. On 4th February, 1854, Joseph Ditcher, Clerk, Vicar of South Brent in the county of Somerset, in the diocese of Bath and Wells, made complaint thereof against the Archdeacon to the then Bishop of the diocese, and presented to the Bishop articles charging the offence, and prayed the Bishop to send the case for trial by *letters of request to the Court of appeal of the province. The Bishop declined to do so. [*548 He died in May, 1854, and was succeeded by Lord Auckland, the present Bishop; to whom, on 21st June, 1854, Mr. Ditcher made a like complaint and prayer, with which the Bishop declined to comply. In October, 1854, Mr. Ditcher applied to the present Archbishop of Canterbury, complaining that the Archdeacon had, within two years, so offended, and praying the Archbishop to issue a commission in pursuance of the statute, for the purpose of making inquiry as to the grounds of the charges. On 30th November, 1854, the Archbishop issued a commission,(a) after notice to the Archdeacon. The affidavit stated the formal steps taken, and the hearing (which will be found stated, with sufficient fulness for the purpose of this report, in the mandamus hereafter set forth), and, finally, that, on 10th January, 1855, one of the Commissioners did "openly and publicly declare the opinion of the said Commissioners, that they were unanimously of opinion that there was primâ facie evidence for instituting further proceedings against him, the said George Anthony Denison." The depositions of the witnesses, and the report of the Commissioners, were transmitted to the Archbishop; the report was filed in the registry of the province of Canterbury; and a copy was forwarded to the Bishop of Bath and Wells. On 8th August, 1855, Mr. Ditcher, "thinking fit to proceed against the said Archdeacon," directed a proctor to cause articles of accusation to be drawn out in pursuance of the statute, and to take all steps proper to bring the same to trial; and served on the Archbishop

(a) See Ex parte Denison, 4 E. & B. 292 (E. C. L. R. vol. 82).

*549] a notice *and requisition reciting the above facts, and that articles had been drawn up and settled by an advocate of Doctors' Commons, on behalf of Mr. Ditcher, and filed, together with the depositions of the witnesses taken before the Commissioners, in the registry of Bath and Wells, and that a duplicate of the articles and depositions had been taken into the registry of the Archbishop's Vicar General, for the purpose of being filed; and that a copy of the articles had since been served on the Archdeacon; and concluding: "Now I, the said Reverend Joseph Ditcher, the party complainant, do hereby humbly and reverently call upon your Grace to proceed in the said inquiry according to law and the statute in that case made and provided." On 11th August, 1855, Mr. Ditcher's proctor received a note from the Archbishop, of that date, to the effect that the Archbishop would take an early opportunity of consulting his legal advisers, and would communicate to the proctor his reply. Afterwards Mr. Ditcher received the following letter, addressed to himself.

"Addington, August 22, 1855.

"Reverend Sir. The Archbishop of Canterbury desires me to acknowledge the receipt of the document in which you call upon him to proceed in the case of Archdeacon Denison according to the provisions of the Act 3 & 4 Vict. c. 86.

"The Archbishop has always considered that the statements of the Archdeacon were such as ought to be submitted to a competent tribunal, and their disagreement with the doctrine of the Church of England solemnly determined. But he is not of opinion that any good purpose will be answered, either by the hearing before the bishop according to

*550] sect. 9 of the statute, or by the process *subsequently prescribed in which the bishop is to try the cause with three assessors nominated by himself, and pronounce sentence thereupon. The decision of such a tribunal would have no weight with the members of the Church.

"It is, therefore, the Archbishop's intention to exercise the discretion which he conceives to be allowed by the Act in question; and he declines to proceed further in the case, unless it should be declared by the proper legal authority that necessity is laid upon him. I have the honour," &c., (signed) "Felix Knyvett, Secretary."

The Archbishop still refused to proceed to a trial.

In last Hilary Term,(*a*)

Sir *F. Thesiger* and *Sumner*, for the Archbishop, showed cause.—They contended that the Archbishop had a discretion, under the Act for better enforcing Church Discipline, 3 & 4 Vict. c. 86, as to whether, even after the report of the Commissioners, he would proceed under sect. 9; that, at any rate, it lay in the discretion of this Court whether, supposing the Archbishop had no discretion, he should be compelled to

(*a*) January 24th, 1856. Before Lord Campbell, C. J., Coleridge, Wightman, and Crompton, Js.

proceed under circumstances subjecting him to expense and inconvenience; especially after the time which had elapsed; and, further, that the Court would not put the prerogative process in motion at the instance of an individual, who, like the present prosecutor, was not interested. They referred to Rex *v.* The Paddington Vestry, 9 B. & C. 456 (E. C. L. R. vol. 17), Bishop of Hereford *v.* T . . . . . n, 2 Robertson's Ecc. Ca. 595, Head *v.* Sanders, 4 Moore's P. C. C. 186, Wetherell *v.* Weighill, 3 Y. & C. Exch. Eq. 243,† In the matter of *The Tithe Commissioners, 1 Dowl. P. C. N. S. 810. [CROMPTON, J., referred to Crake *v.* Powell, 2 E. & B. 210 (E. C. L. R. vol. 75).] [*551

Hugh Hill, for Archdeacon Denison, stated that he was not instructed to argue the question as to the discretion, but contended that the proceedings were invalid for want of a proper complaining party. [COLERIDGE, J., referred to Regina *v.* Archbishop of Canterbury, 11 Q. B. 483 (*a*) (E. C. L. R. vol. 63).]

Sir *Fitzroy Kelly* and *Fortescue*, contrà, were not called upon to support the rule.

Lord CAMPBELL, C. J.—We are all of opinion that this writ should go. If the parties wish us to express an opinion in detail, we will do so, provided they will be bound by our decision at this step. Otherwise, we confine ourselves to saying, for the present, that we think there is sufficient ground for a mandamus.

Sir *Fitzroy Kelly* said that he would simply ask to have the rule made absolute. Rule absolute.

The mandamus issued accordingly. It suggested that "The Venerable George Anthony Denison is a clerk in holy orders of the United Church of England and Ireland, and that he is archdeacon of Taunton, in the county of Somerset and diocese of Bath and Wells, and vicar of East Brent in the same county and diocese, and in the province of Canterbury. And that the Right Reverend Father in God, Robert John Baron Auckland, *by Divine permission Lord Bishop of Bath and Wells, is, and at the time of the application and complaint to you hereinafter mentioned of the Reverend Joseph Ditcher, clerk, vicar of South Brent in the same diocese and county, was, the patron in right of his see as well of the said archdeaconry as of the said vicarage of East Brent." That, on 20th October, 1854, "application and complaint in writing was duly made to you by the said Reverend J. Ditcher, complaining and charging that scandal and evil report existed concerning the said Venerable Archdeacon Denison, as having on divers days and times within two years then last past, within the diocese of Bath and Wells and province of Canterbury, and whilst he was such archdeacon and vicar as aforesaid, offended and committed divers offences against the laws ecclesiastical, as in the said application and complaint mentioned; and also charging and complaining that the said [*552

(*a*) See pp. 522, 555, 561, 578, 633, 638.

Venerable archdeacon, whilst holding such preferment as aforesaid, and within the time aforesaid, had, within the said diocese and province, in fact offended against the laws ecclesiastical as therein also mentioned; and therein also informing you and giving you to understand (as the fact was) that the Right Reverend Father in God, R. J. Baron Auckland," Bishop of Bath and Wells, "was patron, in right of his see, as well of the said archdeaconry of Taunton as of the vicarage of East Brent, and had, on application in writing made to him to send the case by letters of request to the Court of appeal of the province, refused so to do: he, the said Reverend J. Ditcher, humbly applied to you, the said Archbishop, to issue a commission under your hand and seal for the purpose of making inquiry as to the grounds of such scandal, evil
*553] *report and charges aforesaid, according to the provisions of the statute made and passed," &c., (3 & 4 Vict. c. 86.) That "you, the said Archbishop, did, in pursuance of the said application, and according to the provisions of the statute, on" 30th November, 1854, "duly issue your commission under your hand and seal, to the Right Reverend Thomas Carr, Doctor in Divinity, and Bishop of the United Church of England and Ireland, and rector of the Abbey church of Bath in the county of Somerset, the Reverend Reginald Pole, one of the Rural Deans within the diocese of Bath and Wells, and rector of Yeovildon in the said county, the Reverend Charles Langdon, vicar of Queen's Camel in the said county, the Reverend Richard Coulston Phelips, rector of Cucklington in the said county, and the Reverend Charles Otway Mayne, a Rural Dean within the diocese of Bath and Wells, and vicar of Midsomer Norton in the said diocese, and all in the province of Canterbury, wherein and whereby, after reciting (amongst other things) the said application and complaint of the said Reverend J. Ditcher, you did, on the said information, complaint, and application, and in pursuance of the said statute, commission and empower the said commissioners, therein named as aforesaid, or any three of them, to make inquiry into the grounds of the charges made by the said J. Ditcher against the said archdeacon, and otherwise to proceed in the execution of the said commission in manner authorized and directed by the statute." That "you, the said Archbishop, did, on" 3d November, 1854, "being more than fourteen days before the issuing of the said commission, send to the said archdeacon notice, under your hand, of
*554] your intention to issue such commission, such notice containing an *intimation of the nature of the offences charged, together with the names, addition, and residence of the said Reverend J. Ditcher, the party complaining, and on whose application such commission was about to issue; which said notice was duly delivered to the said archdeacon on the day and year last aforesaid." That, "more than seven days before the meeting of the said commissioners, notice, under the hand of the Right Reverend T. Carr, one of the said commissioners, of

the time when and the place where the meeting of the said commissioners was intended to be held in pursuance of the said commission, was duly given to the said archdeacon." That "the said commissioners did duly meet at the time and place named in the last-mentioned notice, and did duly adjourn the said meeting from day to day until the close of the said proceedings. And the said J. Ditcher and the said archdeacon, in person and by his agent duly appointed, attended during all the proceedings; all which said proceedings were conducted publicly; and the said commissioners examined upon oath, and took all the depositions of, all the witnesses tendered to them; and the said archdeacon, by his agent, cross-examined all the witnesses produced in support of the charges made against the said archdeacon by the said J. Ditcher. And, after the close of all the proceedings, and full inquiry made, the said Right Reverend T. Carr did openly and publicly declare the opinion of the said commissioners, and that they were unanimously of opinion that there were primâ facie grounds for instituting further proceedings against the said archdeacon." That "the commissioners did forthwith transmit to you, the said Archbishop, the depositions of the said witnesses so examined and taken before them *as aforesaid, and a report of their said unanimous opinion: which report was duly filed in the registry of your province." That "the said J. Ditcher did thereupon think fit, and does think fit, to proceed against the said archdeacon, and did cause to be drawn up articles against the said archdeacon in due form of law in duplicate original; and did, on" 3d August, 1855, "and within two years after the commission of the offences in respect of which the proceedings were instituted, cause one such duplicate original (the same having been first duly approved and signed by Doctor Bayford, an advocate practising in Doctors' Commons), together with a copy of the said depositions taken by the said commissioners, to be filed in the registry of your province, and did also on" 4th August, 1855, "and within two years after the commission of the offences in respect of which the proceedings were instituted, cause the other of the said duplicate originals (being also first duly approved and signed by the said Doctor Bayford), together with another copy of the said depositions, to be duly filed in the registry of the diocese of Bath and Wells; and did on the said" 4th August, 1855, "and within such two years as last aforesaid, cause a copy of the said articles, so respectively filed as aforesaid, to be served upon the said archdeacon, the same being personally delivered to him: of which you had due notice. And whereas we have been further informed, as aforesaid, that you, the said Archbishop, on being duly requested by the said Reverend J. Ditcher further to proceed in the said matter of the said charges in respect of which the said proceedings have been taken, and the said articles filed, according to the provisions of the *said statute, have refused so to do, although fourteen days after the [*555 [*556

day on which the said copy of the said articles had been so served on the said archdeacon as aforesaid had expired; and that you still refuse so to do; whereupon the said Reverend J. Ditcher hath humbly besought us that a fit and speedy remedy," &c. The writ then commanded the Archbishop that, "immediately after the receipt of this our writ, you require, by writing under your hand, the said Venerable G. A. Denison, Archdeacon," &c., "to appear, either in person or by his agent duly appointed, before you, at a time and place to be by you therein named, according to the provisions of the said statute; and do further proceed in the matter of the said charge or complaint of the said J. Ditcher against the said archdeacon Denison, according to law: or that you show us cause," &c.

The Archbishop returned: "That, in the exercise of the discretion by law vested in me, I have refused to require the said Venerable G. A. Denison to appear before me to make answer to the said articles; and that, on" 22d August, 1855, "I intimated such my refusal to the said Reverend J. Ditcher; and therefore I have not required, by writing under my hand, the said Venerable G. A. Denison to appear, either in person or by his agent duly appointed, before me, according to the provisions of the said statute, or proceed in the matter of the said charge or complaint of the said Reverend J. Ditcher against the said Venerable G. A. Denison, as by the said writ I am commanded."

Demurrer. Joinder.

In last Term,(*a*)

*557] *Sir *F. Kelly* appeared for the prosecutor, and Sir *F. Thesiger* for the defendant. But the Court said that it would be sufficient to give a formal judgment on the demurrer, the opinion of the Court having been intimated upon making the rule absolute: and the case was not argued. Peremptory mandamus awarded.

The peremptory mandamus issued accordingly.

The Archbishop returned: "That I did require, by writing under my hand, the Venerable G. A. Denison, Archdeacon," &c., "in the said writ mentioned, to appear, either in person or by his agent duly appointed, before me, in the Common Hall of Doctors' Commons, situate in the parish of Saint Benedict near Paul's Wharf in the city of London, and our province of Canterbury, and place of judicature there, on Tuesday the 27th day of the present month of May, at eleven o'clock in the forenoon of the same day, and there to abide, during such time as occasion shall require, then and there to make answer to the articles in the said writ mentioned, according to the provisions of the statute in the writ mentioned."

Sir *Fitzroy Kelly*, in this Term, obtained a rule calling on the Archbishop to show cause why the return should not be quashed. On notice to the Archbishop and the Archdeacon.

(*a*) April 19th. Before Lord Campbell, C. J., Erle and Crompton, Js.

Sir *F. Thesiger* and *Sumner*, for the Archbishop, now showed cause.—The question is, whether the Archbishop shows on the return an obedience to the peremptory writ. By sect. 9 of the Act for better enforcing Church *Discipline (3 & 4 Vict. c. 86), it is lawful for [*558 the "bishop, by writing under his hand, to require the party to appear, either in person or by his agent duly appointed, as to the same party may seem fit, before him, at any place within the diocese." The Archbishop here, inasmuch as the Bishop of Bath and Wells is patron of the preferment held by the Archdeacon, is to act, and not the Bishop, by sect. 24, which enacts, "that when any act, save sending a case by letters of request to the Court of appeal of the province, is to be done or any authority is to be exercised by a bishop under this Act, such act shall be done or authority exercised by the archbishop of the province in all cases where the bishop who would otherwise do the act or exercise the authority is the patron of any preferment held by the party accused." The place at which the Archbishop has required the Archdeacon to appear is not within the diocese of Bath and Wells, but is within the province of the Archbishop; so that the question is whether, when the archbishop acts in consequence of the bishop's having the patronage, the "diocese" mentioned in sect. 9 is to be the diocese of the bishop who cannot act or the province of the archbishop who must act. By the interpretation clause, sect. 2, "the word 'bishop,' when used in this Act, shall be construed to comprehend 'archbishop;' and the word 'diocese,' when used in this Act, shall be construed to comprehend all places to which the jurisdiction of any bishop extends under and for the purposes of" stat. 1 & 2 Vict. c. 106. Now, if this clause be applied, by substituting, in sect. 9, "archbishop" for "bishop," and "province" for "diocese," the return is in exact accordance with the section last named. Suppose the *bishop had acted under sect. [*559 13, and had sent the case by letters of request to the Court of appeal of the province, the case must have been heard in the Court of the province. [COLERIDGE, J.—In that proceeding, the Court below is passed over, and the case goes at once to what would otherwise have been a Court of appeal. Here the proceeding is not under that section, nor by way of appeal.] It may, at any rate, be fairly inferred from sect. 13 that the Legislature saw nothing unreasonable in the archbishop hearing the case in the regular Court of his province. By sect. 9 the archbishop may cite any clerk before him in cases where he might have cited him under stat. 23 H. 8, c. 9: and, by sect. 4 of the Act last mentioned, the archbishop might cite any person inhabiting in any bishop's diocese in his province for causes of heresy, if the bishop consented, or did not do his duty in punishment of the same. [COLERIDGE, J.—By sect. 24 of stat. 3 & 4 Vict. c. 86, what the archbishop is to do is the act which would otherwise be done by the bishop: what act was the bishop to have done? CROMPTON, J.—The provision of

that section is in favour of the party charged. At the hearing, by sect. 11 one of the bishop's three assessors must be "the dean of his cathedral church, or of one of his cathedral churches, or one of his archdeacons, or his chancellor": what is the mode of applying that provision when the archbishop acts under sect. 24?] The archbishop surely could not be required to take the dean of his own cathedral church to the diocese of Bath and Wells. [CROMPTON, J.—But he must act by him, or one of the other two of his officers named, according to your construction. COLERIDGE, J.—In what diocese is the Common Hall of Doctors' Commons? Sir *F. Kelly*.—In *the diocese *560] of London. CROMPTON, J., referred to stat. 1 & 2 Vict. c. 106, s. 108.(*a*) COLERIDGE, J.—Suppose the archbishop had simply returned in the words of the writ.] If the facts now on the record do not show an obedience to the writ, he would, in the case supposed, have been liable to an action for a false return. [CROMPTON, J.—That would bring the question on the record.]

It would do so at last: this return arises the question at once. The statute is not distinct as to the diocese, even where the bishop acts. The diocese in which the preliminary proceedings are to take place is not necessarily that in which the party charged holds preferment: by sect. 3 the bishop who is to issue the commission is the bishop of the diocese within which the offence is committed: though, by sect. 6, the bishop of the diocese in which the party holds preferment may, by consent, pronounce sentence; provisions evincing the difficulty of assigning the jurisdiction. [COLERIDGE, J.—The same bishop must surely be meant in each case.] By sect. 5, if the party hold preferment in a diocese other than that in which the offence is charged to have been committed, a copy of the proceedings is to be sent to the bishop of such other diocese. By sect. 7 the bishop of any diocese within which the party holds any preferment may proceed, or the party complaining: in each case the articles, &c., are to be filed in the registry of that diocese. That might not be the diocese of the bishop to whom the complaint has been made: but surely it must be the diocese of the bishop who may think fit to proceed, as appears still more strongly by sect. 9. If that be so, the archbishop, in exercising the jurisdiction in a *case like *561] the present, does so in his own character: and, that being so, he does not simply take the place of the bishop. It is true that the hearing might be at Wells, because that is in the province of Canterbury: but the place would be very inconvenient. [CROMPTON, J.—Supposing you could satisfy sect. 11 by the appointment of the dean of Canterbury as assessor, how would you apply the other alternatives? What relation has an archdeacon or a chancellor to a province?] The provisions rather point to the fitness of persons than to their connexion with the diocese.

No cause was shown on behalf of the Archdeacon.

Sir *F. Kelly* and *Fortescue*, contrà.—It may be admitted that the

(*a*) See sects. 2 and 22 of stat. 3 & 4 Vict. c. 86.

course suggested by the return would be the most convenient one: but the question is whether such a proceeding would be valid. Sect. 24 does not vary the nature of the proceeding, but only the person who is to do the act. Then the nature of the proceeding appears from sect. 9, which directs a hearing in the diocese of "the said last-mentioned bishop," who is the bishop in whose diocese the preferment lies. Sects. 3 and 11 show that the archbishop takes the place of the bishop: as archbishop he has no archdeacon or chancellor. The interpretation clause does not assist: the archbishop is comprehended under "bishop;" but the question is as to "diocese." Now the "places to which the jurisdiction of any bishop extends under and for the purposes of" stat. 1 & 2 Vict. c. 106, are only episcopal dioceses with some enlargements of jurisdiction, as over benefices exempt or peculiar, by sect. 108 of the last-mentioned Act. The archbishop may indeed act as bishop in his own diocese: but, so far as *regards stat. 3 & 4 Vict. c. 86, he acts as archbishop only under the clauses referring to an appeal Court, sects. 13, 15. [*562

(Lord CAMPBELL, C. J., was absent.)

COLERIDGE, J.—I feel considerable difficulty in pronouncing judgment in this case, because, not having before us the third party who is most interested, and not knowing which way his interest points, we may, by what we are going to do, materially injure him. But I do not see how to avoid pronouncing a decision. And, on the best consideration which I can give to the question, I think the rule should be made absolute. The question depends on the 2d, 9th, 11th, and 24th sections of stat. 3 & 4 Vict. c. 86. The 2d, which is the interpretation clause, does not apply closely to this case. There is not much doubt as to the meaning that may be given to the words "bishop" and "diocese:" but the interpretations are not inserted with a view to a question of this sort. The word "bishop" is made applicable to an archbishop with a view to cases where the archbishop would have to proceed in his own diocese; and in such case he is within the provisions affecting bishops. So again the interpretation of "diocese" is not inserted in order to make the word comprehend a province, but with a view to the extended jurisdiction given to a bishop under sect. 108 of stat. 1 & 2 Vict. c. 106; and that this is so appears from the repetition of that section in stat. 3 & 4 Vict. c. 86, s. 22. We then come to sect. 24 of stat. 3 & 4 Vict. c. 86. Now no one can doubt the intention of that clause. It was seen that cases might arise where the party proceeded against held preferment of which *the bishop was patron; and it might be thought not just that in that case the bishop should act as judge: the principle would be somewhat analogous to the canon law right of challenging a judge for interest. In former times, such jurisdiction would have fallen to the pope: but under this section the law is that the archbishop shall exercise the same jurisdiction as would have been ex- [*563

ercised by the bishop. When we look at sects. 9 and 11, we find strong arguments in confirmation of the conclusion to which we have come. The bishop, in this instance the archbishop, is by sect. 9 to require the party to appear at any place within the diocese; by reference to what goes before, it is clear that can mean only the diocese where the offence is alleged to have been committed or the diocese in which the party charged holds preferment. Then, by sect. 11, if the party appears and does not admit the truth of the charge, the bishop has to hear the cause, with three assessors, one of whom is either to be the dean of his cathedral church, or of one of his cathedral churches, or to be one of his archdeacons, or to be his chancellor. When you substitute archbishop for bishop, a seeming difficulty arises upon the expression "his cathedral church," or "one of his cathedral churches." That has probably arisen from the language of sect. 11 having been adopted before sect. 24 was thought of, and inadvertently suffered to remain unaltered after it was added. But the reference cannot be to the province; there is no such thing as a province having two cathedral churches, though we know that a diocese sometimes has. Besides, the provision, even so far as regards a single cathedral, can hardly apply to a province. The same difficulty arises as to "dean," "archdeacons," and "chancellor." But,

*564] if the archbishop *is simply to act in the character of bishop of the particular diocese, the language of the statute may be satisfied. Such is the conclusion suggested by the language of the Act. But, when I recollect that the construction should be favoured which puts the party charged to least inconvenience, I feel most reluctant to adopt a view according to which he might be summoned to any part of the province. If I am told that London is a more convenient place, inasmuch as professional advice may more easily be obtained there, I must on the other hand take into consideration the general principle of law which favours the bringing the administration of justice to the domicile of parties. I quite agree that it would be indecent to argue very minutely on the question of hardship: yet I cannot but see that, if the archbishop can summon the party charged to Doctors' Commons, he may summon him to any part of the province. The last remark I have to make is, that the course we suggest is at any rate safe; for it has never been argued that the inquiry cannot lawfully be holden at Wells: and this is satisfactory to me, when I consider that we are deciding in the absence of the interested party.

ERLE, J.—I concur, and have no remark to offer in addition.

COLERIDGE, J.—I am authorized by my learned brother (Crompton, J.), who has left the Court, to say that he fully concurs in the view which we take.

The following order was finally made:

*565] "Upon reading the affidavit," &c., "and a rule of this Court," &c., "and upon hearing counsel on both sides, *and no cause being shown

to the contrary on behalf of The Venerable George Anthony Denison, Archdeacon of Taunton: It is ordered that the return to the peremptory writ of mandamus in this prosecution be quashed, and that the said writ of mandamus be taken off the file of this Court in order that the time for making a return thereto may be enlarged for ten days now next ensuing."

HUDSON, HUDSON, and FORSTER *v.* BILTON. *May* 27.

Defendant chartered a ship of T. from Sunderland to Barcelona: by the charter-party, half the freight was to be advanced to the master on his signing the bills of lading. T., being indebted to plaintiff, gave him an order on defendant, requiring defendant to pay to plaintiff, on the ship "being load and sailed, out of the advance," 73*l*. Defendant wrote, at the foot of the order, that he agreed to the above.

The vessel, being loaded and in a fit state for sailing, but the clearances not being completed nor the bills of lading signed, left Sunderland harbour, with the captain on board. She crossed the bar; and the captain returned to land, in order to get the papers completed, and sign the bills of lading: he signed them, and got the advance of freight from defendant, who deducted a sum to meet the 73*l*. The vessel stood off and on, waiting for the captain; but, it being found that she had been injured, she returned into Sunderland harbour to repair, the captain not having rejoined her, and did not afterwards sail.

Held, first: that the sailing of the vessel was a condition precedent to the liability of defendant to pay the 73*l*.

Secondly: that the vessel had not sailed, and the defendant therefore was not liable.

ACTION for money received by defendant for the use of plaintiffs, and for money found to be due from defendant to plaintiffs upon accounts stated between them.

Plea: Nunquam indebitatus. Issue thereon.

On the trial, before Willes, J., at the last Durham Assizes, it appeared that the defendant carried on business under the firm of Edward Bilton & Company. A person named Richard White Thompson was owner of a ship called The Royal Oak, which the defendant had chartered for a voyage from Sunderland to Barcelona. The charter-party contained the following clause: "half amount of freight to be advanced the master on signing B||Ls, less customary charges and insurance, *against his draft on receiver of the cargo." Thompson was indebted to [*566 the plaintiffs in about 140*l*.; and for this he had given them his acceptance for 73*l*. 12*s*. 11*d*. The acceptance having become due, and the plaintiffs requiring payment or security, Thompson offered an order on the defendant; and he signed a paper, which was as follows:—

"Dec. 8th, 1855. Sunderland.

"Gentlemen, Please pay to Messrs. Hudson & Forster (on The Royal Oak being load and sailed, out of the advance) the sum of 73*l*."

This paper had no address; but it was sent to defendant, who wrote underneath it: "We agree to the above. E. Bilton & Co.:" and it was then handed to the plaintiffs.

On 11th January, 1856, the vessel, being loaded and in a state fit for

sea, left the harbour of Sunderland with her crew and captain on board. After she had passed the bar the captain returned to land in order to complete the clearing of the ship with the Custom House, obtain the consular papers, and sign the bills of lading, which had not been done. He signed the bills of lading; when the defendant, retaining 100*l.* to meet the order (the amount of which he did not then recollect), paid to him the balance of the half freight. The vessel stood off and on, waiting for the captain. In crossing the bar, she had struck, and had sustained damage which was then thought to be unimportant; but, upon examination, it was found necessary that she should put back into Sunderland for repair, which she did, the captain not having come on board. She had not sailed since. The counsel for the defendant con-
*567] tended that the vessel had never sailed, so as to make the money *payable; and that at any rate the action in this form was not maintainable. The learned Judge reserved leave to move to enter a verdict for defendant; and a verdict was taken for the plaintiffs for 73*l.*

In last Term, *Manisty* obtained a rule Nisi for entering a verdict for the defendant, or for a new trial, on the grounds: "first, that the ship had not sailed; second, that there was no evidence of money received."

On an earlier day in this Term,(*a*)

Hugh Hill and *W. Digby Seymour* showed cause.—First, if the plaintiffs are entitled to the money, they may recover on these pleadings. (On this point they referred to Wharton *v.* Walker, 4 B. & C. 163 (E. C. L. R. vol. 10), Hamilton *v.* Spottiswoode, 4 Exch. 200,† Hodgson *v.* Anderson, 3 B. & C. 842 (E. C. L. R. vol. 10), Walker *v.* Rostron, 9 M. & W. 411:† but the Court pronounced no opinion on the point.)

Secondly, as to the sailing. In the first place, the sailing is not made a condition precedent to the payment of the money. By the charter-party, half the amount of the freight was to be advanced on the signing of the bills of lading: the order on the defendant designates this advance as the fund out of which the money is to be paid; and the object of introducing the words as to the loading and sailing was, not to add a condition, but to fix a time of payment, namely, that at which the bills of lading were signed, which, it was supposed, would be coincident with the loading and sailing, and therefore would be the time at which the
*568] advance *would be made. It is merely a mode of directing that the sum shall be paid out of the advance when the advance is made. In Thompson *v.* Gillespy, 5 E. & B. 209 (E. C. L. R. vol. 85), which was cited when this rule was obtained, the stipulation was simply: "one fourth of the freight to be advanced to the owner's agent in London, on the ship having sailed;" which could refer only to the time of sailing. The designation of the fund out of which the payment is to be

(*a*) May 26th. Before Coleridge and Erle, Js.

made does not create a condition precedent; Sunderland Marine Insurance Company *v.* Kearney, 16 Q. B. 925 (E. C. L. R. vol. 71), and authorities there mentioned. But, further, the ship had in fact sailed. She had left the port in a state fit for sailing, and without any intention to return: the captain had merely gone on shore to complete the clearances and sign the bills of lading. In Thompson *v.* Gillespy, 5 E. & B. 209 (E. C. L. R. vol. 85), where it was held that the ship had not sailed, she had never been in a state fit for sailing; her equipment and crew were incomplete; and she had cast anchor for the purpose of waiting till she could be put into a state of completeness. Here the vessel never cast anchor at all; it was found necessary for her to return. Lord Campbell, in Thompson *v.* Gillespy, said, "There is no pretence for the suggestion that she had commenced the voyage, and was driven back or stopped by the occurrence of something unforeseen:" but here that was clearly the case. [COLERIDGE, J.—When do you say the ship sailed?] When she weighed anchor. [COLERIDGE, J.—Without her papers?] The general policy of the law requires the papers to be provided: but the want of them does not prevent the voyage from having commenced.

**Manisty*, contrà.—First: This was not a case of money had and received, or of accounts stated. (He referred to Cuxon *v.* Chadley, 3 B. & C. 591 (E. C. L. R. vol. 10), and the authorities mentioned on the other side.) [*569

On the second point: the event on which alone the money was payable, the sailing of the ship, had not occurred. [ERLE, J.—Suppose the ship had gone down as she went over the bar.] She would not have sailed, unless there had been an intention of finally departing. Here was no such intention. It cannot be important that she did not cast anchor; the material fact is that she was detained till something should be done necessary to the commencement of the voyage. The absence of the papers is as much a detention as the anchoring. [ERLE, J.—Suppose the captain had sent the ship on to Plymouth, proposing to join her there with the papers.] She would not then have sailed on the voyage: the completeness of the papers is one of the most common tests of the final sailing. [COLERIDGE, J.—If the captain had never been on board at all, it could not have been called a sailing; and I do not see that it can make any difference that he went on board intending to return to land for the papers.] *Cur. adv. vult.*

COLERIDGE, J., now delivered the judgment of the Court.

In this case Thompson, the owner of a ship, The Royal Oak, being pressed for payment of a debt which he owed to the plaintiffs, gave them an order requiring the defendant, who had chartered the vessel, to pay to *the plaintiffs, "on The Royal Oak being load and sailed, out of the advance," 73*l.* The defendant wrote, "We agree to the above." It is contended that the ship being loaded and having sailed is not a condition precedent to the payment of this money, [*570

but that the words merely designated the fund out of which the payment was to be made, and the time at which the fund would arise. But we are clearly of opinion that this was a condition precedent. Then the question is, whether the vessel had sailed. She had broken ground and passed the bar; and there was no intention that she should return into port. But it was not intended that she should prosecute the voyage; nor was she in a condition to do so. The captain had gone on shore to complete his papers; and she was standing off and on for him. We think this cannot be considered a sailing. It cannot be said that the vessel ever had the captain on board for the purpose of the voyage: and, if only the mate had been on board, there clearly could have been no pretence for calling this a sailing. The captain had gone on board merely for the purpose of taking her over the bar, which he had done; and then he had returned to complete the arrangements for her prosecuting the voyage. In Thompson *v.* Gillespy we held, under similar circumstances, that there was no sailing. It is true that there the vessel had cast anchor, and here the vessel was standing off and on; but we think that circumstance can make no difference.

Rule absolute.

*571] *FRANCIS TUMMONS *v.* RICHARD OGLE, GREEN and PIKE. *May* 27.

Where a party to a suit in replevin in a county court, whether plaintiff or defendant, removes the case, and gives, under sect. 121 of stat. 9 & 10 Vict. c. 95, a bond conditioned for prosecuting the suit with effect, the bond is forfeited if the obligor does not succeed in the suit.

THE declaration stated that, by bond dated 31st October, 1854, defendants became bound to plaintiff in 300*l.*; and that the bond was subject to a condition, the tenor, &c., of which was: "Whereas a certain action of replevin was, on the 23d day of September last, commenced in the county court of Surrey holden at Croydon, wherein Francis Tummons the younger was plaintiff, and Richard Ogle the defendant; and whereas the said Richard Ogle had declared to the said court that the title to corporeal hereditaments may come into question in the said suit, and that the damages in respect of which the distress in this behalf was taken amount to more than the sum of 20*l.*: Now the condition of this obligation is such that, if the above bounden Richard Ogle shall prosecute the said suit with effect and without delay in the Court into which it is now about to be removed, and shall prove before the said last-mentioned Court that such title as aforesaid is in dispute between the said parties, and (*a*) that there was ground for believing that the said damage was of greater amount than 20*l.*, then this present obligation shall be void; otherwise," &c. Averment: that

(*a*) Sic.

the plaintiff was and is the person in the condition named Francis Tummons the younger, and the defendant Richard Ogle was and is the person therein named Richard Ogle. That afterwards the action of replevin was removed by *R. Ogle, by means of a writ of certiorari issued out of the Court of Exchequer, from the County [*572 Court of Surrey into the Court of Exchequer, being the Court into which the said action was about to be removed as stated in the said condition. "Nevertheless the said R. Ogle did not prosecute the said suit with effect: and such proceedings were therein had in the said Court of Exchequer that the plaintiff recovered a judgment of that Court therein against the said R. Ogle; whereby it was considered that the plaintiff should recover against the said Richard Ogle 89*l.* 7*s.* 2*d.*, being for his damages by the said Richard Ogle's acts complained of in the said action, and for the plaintiff's costs of suit in that behalf: and the said R. Ogle did not prove before the said Court that the title to any corporeal hereditaments was in dispute between the plaintiff and the said R. Ogle in the said suit or otherwise; nor did the said R. Ogle prove before the said Court that there was, nor was there, ground for believing that the damage, in respect of which the said distress in the said condition mentioned in that behalf was taken, was of greater amount than 20*l.* Whereby the said bond became and was forfeited. And the defendants have not paid," &c.

Plea, by the defendant Ogle. That "before and at the time of the committing of the trespasses by the horses of the said plaintiff as hereinafter in this plea mentioned, he, the said defendant, was possessed of and in the occupation of certain lands, tenements, and hereditaments, situate and being in the parish of Croydon in the county of Surrey, called Biggin Hall Farm. And that, being so possessed thereof, and in such occupation as aforesaid, nine horses of the said plaintiff wrongfully broke and entered certain closes, part and parcel of the [*573 *said farm, and trod down, eat up and destroyed divers large quantities of corn," &c., "of the said defendant, there then growing. Wherefore he, the said defendant, then distrained the said horses, then being in and upon the said closes, as and for and in the name of a distress for the said damage then done and doing as aforesaid. And, because the pound of and belonging to the district in which such distress was so made as aforesaid was not sufficient to hold the said horses, he, the said defendant, then drove the same into a certain yard, part and parcel of the said farm of which he was in such possession and such occupier as aforesaid, and there impounded the same for the cause aforesaid." "That, the said horses being so distrained as aforesaid, the said plaintiff made his plaint to the sheriff of the said county, and prayed that the said horses might be forthwith replevied and delivered to him, the said plaintiff: and thereupon the said sheriff replevied and made deliverance of the same to the said plaintiff, according to the

duty of his said office: and afterwards, to wit at the then next county court of the said county, did appear, and then in the same court levied his plaint against the said defendant, for that he took the said horses and detained the same against sureties and pledges, and that therefore he, the said plaintiff, claimed the sum of 150*l.* of and from the said defendant: and which said plaint was and is the said action of replevin in the said declaration mentioned." That one Henry Richards, one of the attorneys of this Court, was, before and at the time of levying of the said plaint, the attorney and agent of the said plaintiff, and was then the clerk of the said court in which the said plaint was so levied as aforesaid; and, in the event of a jury being required in the *said action of replevin, he, the said H. Richards, was, as such clerk, the party to nominate and summon the said jurors. Wherefore he, the said defendant, knowing that the said sum of 150*l.* was an excessive and exorbitant claim, and believing that a fair and impartial trial would not be had in the said county court, and that difficult questions of law would arise at the trial of the said cause, and having grounds to believe that the damages in respect of which the said distress was so made as aforesaid were more than the sum of 20*l.*, or that the title to the said lands and hereditaments called Biggin Hall Farm might and would come into dispute, caused the said writ of certiorari to be issued out of Her Majesty's Court of Exchequer, and thereby removed the said plaint from the said county court, as in the said declaration mentioned. Whereupon the said plaintiff declared in Her Majesty's said Court of Exchequer, in the said action of replevin, being the said action of replevin in the said declaration mentioned, for that he, the said defendant, on the 6th day of September in the year of our Lord 1854, in the parish and county aforesaid, in a certain yard there, took the said nine horses of the plaintiff, and detained the same against sureties and pledges, until, &c. And thereupon he, the said defendant, well avowed in the said action the taking of the said horses: but he said that he took the same in a certain field in the parish and county aforesaid, part and parcel of the said farm called Biggin Hall Farm, next to and adjoining a certain highway leading from Croydon aforesaid into and into a certain other highway leading to Sydenham in the county aforesaid: without this, that he took the said horses or any of them in the said place in the said declaration mentioned. And, for having a *return of the said horses, the said defendant well avowed the taking of the same in the said field, and justly, &c., because he said that, before the said time when, &c., and at the time of the making of the demise hereinafter mentioned, one Charles William Dilke was seised in fee of the same field." That Dilke demised, by indenture, the field, amongst other premises, to one William Witney, for twenty-one years from 29th September, 1844; and Witney entered, and, by indenture of 23d October, 1849, assigned all his estate and de-

*574]

*575]

mised premises to defendant; "who then entered into and upon the same, and then became, and until the making of the said distress was lawfully possessed thereof. And, because the said horses were wrongfully and injuriously in the said field, treading down and depasturing the corn," &c., "there then growing and being, and doing damage there to the said defendant, he the said defendant well avowed the taking of the said horses in the said field, and justly, &c., as and for and in the name of a distress for the said damage so there done and doing as aforesaid. And the said plaintiff thereupon took issue on the said defendant's plea." "That such proceedings were thereupon had, in the said action of replevin, that the same came on to be tried before the Honourable Mr. Justice Wightman, at the assizes for the said county, holden next after the making of the said distress: when it was proved, on the part of him the said defendant, that the title to the said farm called Biggin Hall Farm, on which the said distress was so made as aforesaid, was, or might have come, in dispute in the said action of replevin; and that the said C. W. Dilke was so seised in fee of the said farm, and so demised the same as in the said action of replevin mentioned; and that the said William Witney so entered *upon the said farm, and assigned the same to the said defendant; and [*576 that he, the said defendant, whilst in the possession and occupation of the said farm on which the said distress was so made, lawfully distrained the said horses of the said plaintiff doing damage there as in the said avowry mentioned; and that he, the said defendant, had grounds to believe that the damage in respect of which the said distress was taken was of greater amount than 20*l.* And the Honourable Mr. Justice Wightman thereupon directed a verdict to be entered for the said defendant: when an objection was then taken, on the part of the said plaintiff, that, as the said horses of the said plaintiff were admitted to have been, after the making of the said distress, in the yard of the said defendant, as in the declaration in the said action of replevin mentioned, the verdict must be found in favour of the said plaintiff. And, the Honourable Mr. Justice Wightman being of that opinion, an application was then made to him on the part of the said defendant for permission to amend the said avowry, by inserting therein the said several allegations contained in the said avowry for a return of the said horses, thereby enabling the said defendant to justify the taking of the said distress so doing damage to the said crops of the said defendant as aforesaid; and which said ground of defence was that which was always relied upon and intended to be set up by the said defendant as a bar to the said action of replevin: but the said Judge then refused to allow such permission to amend. And such proceedings were thereupon had, in the said action of replevin, that the said plaintiff, by the consideration and judgment of the said Court of Exchequer, recovered against the said defendant the sum of 89*l.* 7*s.* 2*d.*, as well for the

*577] *damages," &c., "as for his costs," &c.; "and which said sum of 89*l.* 7*s.* 2*d.* was afterwards, and before the commencement of this suit, paid by the said defendant to the said plaintiff, and accepted by the said plaintiff in satisfaction of the said judgment, and in performance of the said condition of the said bond in the said declaration mentioned."

Demurrer. Joinder.

Lush, for the plaintiff.—The bond is forfeited by the obligor not having fulfilled the condition that he should "prosecute the said suit with effect." The obligor here is the defendant in replevin; and the bond is not a common replevin bond, which can be given only by the plaintiff in replevin. This bond is given under the County Court Act, 9 & 10 Vict. c. 95. Sect. 121 requires the party removing an action of replevin from the county court to become bound "to prosecute the suit with effect and without delay," and also to prove before the Court which tries the case that the title was in dispute, or that there was ground for believing that the rent or damage was more than 20*l.* By sect. 127, the bond is to be forfeited unless the Judge who tries certifies that the condition has been fulfilled; provided that the Court may make a rule, in the nature of a defeasance to the bond, giving such relief as is agreeable to justice and reason. Now the defendant on this record admits that he has failed in the action, and that there has been judgment against him. The plea appears to set up the supposed misruling of the Judge at Nisi Prius, in not allowing an amendment. But the defendant cannot impeach the ruling of the Judge collaterally.

*578] The *meaning of the words "prosecute the suit with effect," which is the expression in sect. 121, and is followed in the condition of the bond, is to "succeed in the action." That is the meaning given to the same words in the replevin bond under stat. 11 G. 2, c. 19, s. 23, from which the language of sect. 121 of stat. 9 & 10 Vict. c. 95, is manifestly copied; Perreau *v.* Bevan, 5 B. & C. 284 (E. C. L. R. vol. 11), Jackson *v.* Hanson, 8 M. & W. 477.† [ERLE, J.—The plaintiff in replevin, who gives the replevin bond, gets the benefit of having back the distress at once; the object of this bond is to get the suit out of the jurisdiction of the county court. The plaintiff in replevin is nominally the actor. However, I do not know that he may not be considered as the party defending himself, and the defendant as the party prosecuting the suit for the purpose of getting the goods back. COLERIDGE, J.—I hardly see what prosecuting the suit with effect can have to do with the removal of the suit out of the county court.] The prosecuting is, in effect, the act of either party: if the plaintiff abstains from declaring, the defendant may compel him to declare. [CROMPTON, J.—Perhaps sect. 121 may be read as if the words "in the case of removal by the plaintiff" were inserted before the words "to prosecute the suit with effect." It would, however, be a strong instance of insertion.] It

is to be observed that here the plaintiff in replevin must have given a bond conditioned in the same words: in the case of that bond the interpretation, beyond question, is that the obligor must succeed in the suit: it would be strange to interpret the same words differently according as a different party was sued. *(He also argued that the record showed other breaches of the condition.) [*579

J. G. Malcolm, contrà.—It is true that the words in stat. 11 G. 2, c. 19, s. 23, have the meaning suggested. There the plaintiff in replevin, who has the advantage of getting the distrained chattels out of the hands of the distrainor, gives a bond conditioned for replacing the distrainor in his previous position, by returning the chattels, unless it be shown, by the event of the suit, that the distrainor had no right to take the chattels. But in the County Court Act, interpreting in each case the words secundum subjectam materiam, the signification is different. The defendant has not to return the chattels in any event: he has only to show, by an effective defence, that the removal is not vexatious. The plaintiff, indeed, seems still to subject himself to the same liability as under stat. 11 G. 2, c. 19, s. 23; for he must still return the goods. [COLERIDGE, J.—It is very difficult to say that parties entering into bonds conditioned in the same words are subject to different liabilities. CROMPTON, J.—Perhaps the Legislature, in the later statute, had the costs in view: one bond might be given under it for that; another, under stat. 11 G. 2, c. 19, for a return.] The plaintiff, by the event of the suit, gets all he wants. [COLERIDGE, J.—Suppose the plaintiff succeeds and the defendant becomes insolvent.] That hardship is not removed by the bond. [COLERIDGE, J.—Yes; there are sureties in the bond.] The bond then may cover such expenses as can be shown to have been occasioned to the plaintiff by the removal. [COLERIDGE, J.—Then you admit that the condition would be broken: which part would be broken?] If the defendant do not pay the *costs, he does not prosecute with effect. [COLERIDGE, J.—Then the "effect" is the payment of costs.] It is difficult to suggest a more direct meaning: the defendant in no sense prosecutes the suit; he cannot be nonsuited; he has no writ. (He then argued as to the other suggested cases of forfeiture.) [*580

Lush, in reply.—The bond is given to secure the party's not removing unless he is in the right; the removal in replevin (unlike the case of other actions) is exclusively the act of the parties; the Judge cannot abstain from trying replevins, though title come in question; Regina *v.* Raines, 1 E. & B. 855 (E. C. L. R. vol. 72). The bond secures to the obligee the amount of damages which he has suffered by the removal; that includes, not only the costs as between the parties (which the judgment gives), but the costs as between attorney and client.

(Lord CAMPBELL, C. J., was absent.)

COLERIDGE, J.—I am of opinion that the plaintiff is entitled to our

judgment. Several points have been made: for my own part, I think it not wise to hazard a judgment on more points than are necessary to our decision, when we have before us a section not very artificially framed. But upon the principal point, which was that first taken, I entertain no doubt. Sect. 121 of stat. 9 & 10 Vict. c. 95, was framed with special reference to sect. 23 of stat. 11 G. 2, c. 19: and the provision in sect. 127 gives an equitable remedy in a case where the enforcement of the bond produces a *hardship, like that given in the second part of sect. 23 of stat. 11 G. 2, c. 19. So we have a strong argument for interpreting the same words in the two statutes in the same way. Now it is not disputed that in the earlier statute prosecuting the suit with effect means succeeding in the suit. It is true that in the later Act the bond may be given by the defendant; and the word "prosecute" does not so aptly apply to him as to the plaintiff, from whom, under the earlier Act, the bond was always taken. It has been thought right, in the modern Act, to make the defendant as well as the plaintiff give a bond on removal, and with the same condition. If it were impossible to assign any meaning to the words in the case where the bond is given by the defendant, you might, as suggested by my brother Crompton, interpolate the words "in the case of removal by the plaintiff:" but that would be violent, and ought not to be done if we can find a meaning without it. Now it seems to me that we ought

*581]

to consider that this is a peculiar suit, and that the defendant and plaintiff are both actors, and the one quite as likely to remove as the other. I look to see if I can get a reasonable meaning. The defendant is really a party conducting the suit: and, if the plaintiff be sluggish, the defendant may force the plaintiff on: and, not to put so extreme a case, there are many things which he may do to prevent delay. The statute may therefore reasonably mean that the defendant should do all that lies in him to prosecute the suit without delay, and that he ought not to be relieved from the liability to indemnify if the suit ought not to have been removed. That is a reason for holding to the language of the statute; the words of which would not, I think, be more express if it had *been said that either plaintiff or defendant should enter into such bond: as much reason in that case might have been given for striking out the enactment as to the defendant as now for inserting words restricting to the plaintiff. I have no doubt that we are justified in extending to the defendant the words "prosecute the suit with effect." We should be cavilling upon expressions if we held otherwise.

*582]

ERLE, J.—I also am of the same opinion. I examined Mr. *Lush's* argument with much scrutiny, because I think that sect. 121 is not consistent with the main body of the statute, which gave jurisdiction to the county court only where the damages were of a limited amount and the title would not come into question. No doubt the cheapness of

the proceeding was most valuable, but in cases only of that description: the Legislature, therefore, where the damages exceeded that amount, or title came in question, considered the more costly and more dilatory mode the more satisfactory one. No doubt very often county court judges are most able and fit: but such qualifications are personal; and there may be county court judges less fit. And therefore the party, in cases where the damages exceeded the amount, or title was in question, had reserved to him the right to come to the Superior Courts. It is unaccountable to me why, if the mere form of the action is varied, and is replevin, the party may not come into the Superior Courts unless he can get sureties to be bound for him, who, if he fail in the action, are to be liable for him, and, as Mr. *Lush* contends, to the amount of costs as between attorney and client. But Mr. *Lush* has satisfied me that the words of the statute are so plain that in *replevin, whatever question of title may arise, the county court judge is bound to [*583 go on, unless one of the parties chooses to remove, which he can do only on the condition of his giving the bond. Then I have to look whether the word "prosecute" can be applied to the defendant. The terms of sect. 121 make it applicable to each. I can see good reason why, in stat. 11 G. 2, c. 19, s. 23, the plaintiff should be bound to prosecute with effect: for he takes goods of which the defendant is in possession, and does so without right unless he prosecutes the suit with effect. But none of that reasoning applies in the least degree to the case of the defendant, from whom goods are taken to which he has an apparent right. It seems reasonable that he should be allowed to remove, if the damages exceed the limited amount or title is in question, without any stipulation as to his success. But Mr. *Lush's* argument convinces me. The words must have some meaning assigned to them: and I cannot say that, though they are more applicable to the case of the party who brings the suit, they are not still applicable to the defendant, who may, in common language, be said to carry on the suit. I think, therefore, that I am bound to give effect to the words. I by no means agree as to the extent to which the obligor is bound to indemnify: but as to that it would be idle to offer an opinion at present.

COLERIDGE, J.—My brother Crompton, who left the Court at the close of the argument, entirely agrees with us.

Judgment for plaintiff.

*584] *In the matter of a plaint between GEORGE FREDERICK BOWERS and EDWARD CHALLINER, plaintiffs, and EMANUEL LOVEKIN and THOMAS HOLCROFT. *May* 30.

By an agreement with a mine owner, two persons engaged as "butty colliers." It was found, as a fact, that butty colliers get the produce of the mine at so much a yard; that they employ others under them to increase the quantity; but that they must work personally, and are treated as workmen.

Held that, on this finding, butty colliers were artificers within the Truck Act, stat. 1 & 2 W. 4, c. 37: the distinction between contractors and artificers depending on the fact whether by the engagement they were labourers.

THIS was an appeal from a decision of the judge of the county court of Staffordshire, holden at Hanley. The plaint was for 23*l.* 8*s.* 9*d.*, for cash lent, and the amount of work overpaid; and there was a notice of set-off for work and labour. The judge gave judgment for the defendants, subject to the following case stated by the judge of the county court.

The facts proved to my satisfaction were as follows:

The plaintiffs were owners and workers of a colliery; and the defendants were butty colliers, employed by the plaintiffs at such colliery; and the action was brought to recover money which had been, as the plaintiffs allege, advanced to the defendants on account of the work done by them for the plaintiffs, and which plaintiffs claimed as having been overpaid by them, beyond what turned out to have been earned by the defendants. The evidence proved to my satisfaction that butty colliers are two or more working colliers who join together and enter into agreements with their employers, to get coal or ironstone from certain pits, at so much a yard, or so much a ton; and such butty colliers are in the habit of working at such work themselves, and of employing other men under them to increase the quantity raised. The

*585] agreement, in this case, was made by the *colliery agent with the defendants, orally, as butty colliers, to get ironstone at so much per square yard. No particular quantity was stipulated for to be gotten in any specified time; but the defendants did in fact employ some twenty or thirty men under them; they so continued to work to the 19th January, 1855, and during that period received an amount by way of advance, the first four items in the plaintiffs' particular, to the amount of 10*l.* 5*s.*, such items being brought into account in the weekly wage bills rendered by the plaintiffs to the defendants as thus:

Wage Bill, 3d November, 1854. No. 4 Pit Cos.

		£	s.	d.
93½ yards iron stone in stack . . .	93½ at 4*s.* 6*d.*	21	0	9
8 yards in north level and 11 yards south .	19 at 5*s.*	4	15	0
8 yards in dip	8 at 5*s.*	2	0	0
Drawn on account		2	0	0
		29	15	9

Stoppages						29	15	9
	Sharpening . . .		0	8	0			
	Candles . . .		1	4	9			
						1	12	9
						£28	3	0

And so in subsequent wage bills. November 10: Paid on account 4*l*. November 17: Paid on account 1*l*. 10*s*. November 24: Paid on account 2*l*. 15*s*. Making together, as paid beyond what was earned, the sum of 10*l*. 5*s*.

An alteration was made in the agreement previously to the 19th January, 1855; and the defendants were then to be paid by the ton, viz., 6*s*. 6*d*. per ton (reduced to 6*s*. 3*d*. on the 9th February) when calcined; and the *weight was to be ascertained when it passed over the machine, which was not done until it was sold. What [*586 was gotten therefore by the defendants in one week had to be calcined and cooled, and was not carted away and weighed until a considerable period afterwards; and the defendants were consequently paid weekly on a supposed quantity, which had subsequently to be ascertained.

Wage Bill, 19th January, 1855. No. 4 or Brown Mine.

						£	s.	d.
Paid on account of calcined ironstone (tons 45) at 6*s*. 6*d*.						14	12	6
Dip North side			8	"	4*s*.	1	12	0
Dip South side			10	"	4*s*.	2	0	0
						18	4	6
Sharpening		0	4	0				
Candles		0	16	6				
Repairs		0	2	0				
Oil		0	1	4				
Timber		0	10	0		1	13	10
						£16	10	8

In consequence of this mode of proceeding the defendants were paid, up to the 23d March, 1855, 236*l*. 13*s*. as for 747 tons, calculated at 120 lbs. to the cwt., by what is called long weight: but, after the whole of the ironstone had gone over the machine, and the real weight had been ascertained, it in fact amounted only to 704 tons 16 cwt.; so that the defendants had been settled with for 42 tons 4 cwt. more than they had actually gotten, and so overpaid to the amount of 13*l*. 3*s*. 9*d*., the last item in the plaintiffs' particular, making, together with the former items, the whole sum of 23*l*. 8*s*. 9*d*. sued for: but in the amount of 236*l*. 13*s*., so reckoned as paid, it was admitted that upwards of 23*l*.

*587] 8*s.* 9*d.* was *brought in as payments, not in money, but as weekly stoppages for sharpening tools, oil, candles, timber and other materials furnished by the plaintiffs to the defendants in carrying on their work, and so charged against them; and it was also admitted that upon some of the things so supplied to the defendants the plaintiffs made a profit. It was also proved that, after the commencement of the present action, and after the defendants had been served with the summons, they issued a writ out of the Court of Exchequer at Westminster, against the present plaintiffs in this action, for 114*l.* 17*s.* 11*d.*, which included the amount pleaded as a set-off in this action.

Upon this state of facts, as proved before me, I held that the defendants were artificers, and the plaintiffs were employers, within the meaning of the Truck Act (1 & 2 W. 4, c. 37); it having been proved to my satisfaction that they were treated as workmen, by working, first by the yard and then by the ton, by having their wage bill rendered weekly, by being served with notice of the regulations of the colliery in respect to workmen's rules, and one of them, Holdcroft, having been dismissed for absence, and then taken on again as any other workman, and that they were bound to give their personal labour as any other workman, and that they engaged and were bound to bestow their personal labour in the work, and that the plaintiffs held them and treated them as so bound; and I also held that the defendants being associated together as such butty colliers did not alter their character as such workmen, so as to make them less artificers within the meaning of the Truck Act: and I also held that the stoppages or deductions brought as payments

*588] into the weekly wage *bills, for candles and other things supplied by the plaintiffs to the defendants, came within the first section of the Truck Act, and were void and illegal, not being in the current coin of the realm, and that therefore such things so supplied and charged for to the defendants by the plaintiffs did not constitute a valid and legal payment, and therefore that to that extent the earnings remained unpaid; and, if so, then that the plaintiffs had, to that extent, failed to prove that they had advanced and paid the amount claimed beyond what was earned by the defendants. I therefore gave judgment for the defendants. Against this judgment the plaintiffs appeal; and, the parties not having agreed, I have settled the above case. And the question for the Court is whether my judgment was correct, on the above state of facts, in point of law.

Scotland, for the appellants.—If the weekly stoppages for sharpening tools and for materials supplied by the plaintiffs were illegal, the defendants have not been overpaid: if those stoppages were not illegal, the defendants have received more than they were entitled to, and the plaintiffs ought to have recovered. The question therefore comes to be whether the case is brought within stat. 1 & 2 W. 4, c. 37. Sect. 1 enacts that the payment of the wages of any artificer in certain trades,

amongst which is that of miners, shall be made payable in the current coin of this realm only, and not otherwise. Sect. 3, that such wages shall be actually paid in the current coin of the realm; and that every payment to any such artificer "by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared *illegal, null, and void." The exception points to sect. 23, which legalizes the [*589 stoppage of wages for materials or tools, but only in case of there being a contract in writing for such stoppages, which there was not here.(a) The question therefore is whether butty colliers, such as are described in the case, are artificers within the meaning of the Act. In Riley *v.* Warden, 2 Exch. 59,† the Court of Exchequer decided that the Act did not apply, unless the person who was said to be an artificer was bound to labour personally. In Sharman *v.* Sanders, 13 Com. B. 166 (E. C. L. R. vol. 76), the Court of Common Pleas approved of and acted upon that decision. There the person who was held not to be an artificer appears to have been very much in the position of the respondents, working himself and employing others under him, and being paid according to the work done. In Weaver *v.* Floyd, 21 L. J. N. S. Q. B. (County Court Appeal, before two Judges), 151, the plaintiff was held an artificer. Patteson, J., says: "If the agreement was that the plaintiff should work personally, though he might employ others under him, he was, I think, an artificer within the meaning of the Act of Parliament; but if the contract was that the plaintiff undertook a portion of the mine to gain coal by the hands of others, without being bound to go to it or work at it himself, then I should say that the case fell within the principle of Riley *v.* Warden." [Lord CAMPBELL, C. J.—It is not a question of fact whether the contract was of the one sort or the other? And does not the county court judge, in this case, find the fact against the appellants?] He states the original contract, by which it does not appear that the defendants were *bound to [*590 work personally. It is stated that it is the habit of butty colliers to do so, but not that it is part of their contract.

Keating, for the respondents, was not called upon to argue.

Lord CAMPBELL, C. J.—Weaver *v.* Floyd, 21 L. J. N. S. Q. B. 151, was decided by two learned Judges of this Court sitting after Term to hear appeals; but I give as much weight to it as if it had been a decision of this Court in banc. And I entirely concur in the reasoning which led to that decision. The Act applies to cases in which by the contract the personal labour of the artificer is to be given, though he may be at liberty also to procure the labour of others. This case is entirely within that principle; for here it is found as a fact that the defendants were bound to give their personal labour like any other workmen. That finding would not be conclusive if there was no evi-

(a) See Chawner *v.* Cummings, 8 Q. B. 311 (E. C. L. R. vol. 55).

dence to justify it; but the Judge sets forth ample evidence. The contract was by parol with these men as coal butties; and the usage was for coal butties to work personally; and there are other circumstances, fully justifying him in drawing the conclusion that by the contract the coal butties were bound to give their personal labour.

I think therefore that the judgment was right and should be affirmed.

COLERIDGE, J.—I agree in thinking that Patteson, J., in Weaver v. Floyd, laid down the true rule. In *considering the Act we must recollect that it is a restriction on the general liberty of men to make what contracts they please; and that it has been thought necessary to impose this restriction on account of the position of master and labourer. That gives the key and limitation to the construction of the Act. It must be a contract for the person's labour so as to make him a labourer. When once it is decided that this is the material point, it is important that we should not make nice distinctions in such a matter, as they must be acted on by illiterate persons. Here the Judge has found the leading fact, that the defendants were bound to give their personal labour.

*591]

ERLE, J.—It is clear that the defendants were engaged to give bodily labour, so as to be within the Act. I agree with Riley v. Warden, 2 Exch. 59,† in which it was held that a person merely contracting to get work done is not within the Act, though he may actually work himself. I also agree with what Patteson, J., says in Weaver v. Floyd, except that I should put a limitation on the latter part of it. I should not assert that, where a man has contracted to do artificer's work at wages to be regulated by the piece, he is necessarily out of the protection of the Act, unless it is expressly stipulated that he must work himself. I take the true construction of the Act to be that it applies to contracts for artificer's work to be paid for by the piece, whenever it was intended that the contractor should personally do all or part of the work as a workman, so as to make him one of the class of artificers. I agree with what *is observed by Maule, J., in Sharman v. Sanders, 13 Com. B. 166 (E. C. L. R. vol. 76), that the Legislature intended to protect a particular class. I think in such cases you must look at the nature of the work, the contract and the position of the parties, and say whether they were of that class.

*592]

CROMPTON, J.—The judge of the county court, who has jurisdiction to find the facts, has here found as a fact what the nature of the contract was. He has found that the defendants were bound to give their personal labour like other workmen. They were not to be the only labourers, but they were bound to go on and work personally; and if they refused they would be subject to the provisions of stat. 4 Geo. 4, c 34.(a) I think on this finding the case is within the Act according to the decisions, and that we are bound by them. The decisions raise

(a) See Bailey's Case, 3 E. & B. 607 (E. C. L. R. vol. 77).

a distinction which in some cases may be refined; for, when the remuneration for the labour of many men is to be paid at intervals to one man, who himself works, it may be no easy matter to say whether he is the foreman of a gang of artificers receiving their wages along with his own, perhaps getting a commission from them for doing so, or whether he is a contractor, speculating in the labour market, though working himself. The authorities however decide that it must be found as a fact, which it is. In this case it is found as a fact; and I am glad that I am relieved from deciding on the evidence myself.

Judgment affirmed.(*a*)

(*a*) See Ingram *v.* Barnes, Hil. T. 1857.

*DANIEL ROWBOTHAM *v.* WILLIAM WILSON.

May 30.

[*593

Action for injuring the plaintiff's reversion, by removing the minerals without leaving support to the surface, on which were houses more than twenty years old; whereby the houses were injured. On a special case it appeared that, ninety years before the action, the locus in quo was enclosed by an award made under an Enclosure Act: that the surface was allotted to P., whose estate plaintiff had; and the minerals to H., whose estate defendant had: that on the face of the award it was stipulated that the allottees of the mines should have liberty to work the mines, and the allottees of the surface should have no claim to compensation for any consequent sinking of the surface. P. executed the award as a deed. H. did not execute it, but accepted the allotment under it. The houses were afterwards built. By defendant's mining, without negligence, the surface unavoidably sunk.

Held, that it sufficiently appeared that, upon the severance of the minerals and surface, the owner of the surface took it as a separate tenement with only a qualified right of support that no further right of support was gained by the erection of the houses, though they had stood for more than twenty years; and that the subsequent owners of the surface took it with only the qualified right of support originally created: and that therefore the plaintiff was not entitled to maintain the action.

FIRST count: that plaintiff was interested in the reversion of houses, which had been erected for more than twenty years, and was rightfully entitled to have the foundations supported by the subjacent land and minerals; and that defendant worked the subjacent mines carelessly and without leaving sufficient support for the houses, which, in consequence, cracked. Second count: that plaintiff was interested in the reversion of land; and that the defendant negligently worked the mines below it without leaving sufficient support for the surface, which gave way.

Plea: setting out the effect of a private Act (9 G. 3, c. 101,(*a*)) by which commissioners were required to divide, ascertain, and allot the common grounds in Bedworth among the persons who, at the [*594 *time of their award, should be interested therein, with a just regard to any mines or delphs of coal, lime, or stone supposed to lie

(*a*) Private: "For dividing and enclosing the common fields, common grounds, and commonable lands, in the parish and township of Bedworth, in the county of Warwick; and for regulating certain charity estates within the said parish."

under the same: and that, before the houses in the first count mentioned were built, in 1770, by the award in writing of the commissioners, the lands in question were allotted to Samuel Pears under whom the plaintiff claims, and the mines under them to Henry Howlett under whom the defendant claims.

The plea then set out the effect of the award, which was also executed as a deed by the ancestor of the plaintiff, and justified under it. To this plea there was a demurrer.

On the demurrer coming on for argument in last Hilary Term (18th January), at the suggestion of the Court, it was agreed that a special case should be stated. By this it appeared that the plaintiff became seised of the surface of the land in the declaration mentioned, by divers mesne conveyances from Samuel Pears, to whom it was allotted under the award after mentioned. The buildings on the land were not erected till after the award, but were more than twenty years old at the time of the committing the grievances. The defendant worked the mines which were those allotted to Henry Howlett in the award. The surface had sunk because of the removal of the minerals below. They were worked skilfully; but no skill could prevent such subsidence, if the minerals were removed. The case then stated the making of the award or instrument in writing, by the commissioners, under stat. 9 G. 3, c. 101. It bore date 21st June, 1770, and was under the hands and seals of the three commissioners under the Act, and of several other persons, amongst whom was Samuel Pears, but not Henry Howlett. By it the

*595] *commissioners awarded and allotted certain lands to Henry Howlett: and, as to the mines on the estate of Henry Howlett, previously to the enclosure thereof, they allotted to Henry Howlett, in lieu thereof, all the mines and minerals under certain allotments there specified, including those under the allottment to Samuel Pears. And they allotted to Samuel Pears certain lands (being the locus in quo) adjoining to the allotment to Henry Howlett. And, as to the mines on the estate of Samuel Pears, they allotted to him the mines under certain lands described, which they adjudged to be equal in value to the mines he was previously possessed of, without being entitled to any part of the mines under his own allotment. The instrument then contained the following recital and covenants.

"And whereas, in order to preserve the convenience of situation of the allotments to the several proprietors interested in the said enclosure and division, it hath been found necessary in some cases to assign the mines under the whole of some particular allotments, and in other cases part of such mines, to different persons than those to whom the allotments of the surface land are awarded, and the several proprietors, parties to this our award, are the only persons interested in the disposal of land and mines under such circumstances, which said proprietors, parties hereto, do, by their sealing and executing these presents,

testify their acceptance of their respective allotments in manner as the same are allotted to them as aforesaid, and do, for themselves severally and respectively, and for their several and respective heirs, executors, administrators, successors, and assigns, utterly disclaim, release, and disavow all right, title, interest, claim, and demand of, in, or to any of the *mines under their several allotments, except such or such part thereof only as are hereinbefore particularly mentioned and described to be allotted to each of them. And the same proprietors do hereby, for themselves, severally and respectively, and for their several and respective heirs, executors, administrators, successors, and assigns, covenant, promise, and agree to and with each other, and the heirs, executors, administrators, successors, and assigns of each other, that the said mines, so allotted under the circumstances aforesaid, shall or lawfully may, for ever after, be held and enjoyed by the respective persons to whom the same are assigned, according to the true intent and meaning of this award; and by them and every of them to be worked and gotten accordingly, without any molestation, denial, or interruption of any other person or persons parties to these presents, and those claiming under them respectively, who, for the time being, are or may be owner or owners of the surface of the lands under which such mines are situate, and without being subject or liable to any action or actions for damage on account of working and getting the said mines, for or by reason that the surface of the lands aforesaid may be rendered uneven, and less commodious to the occupiers thereof by sinking in hollows, or being otherwise defaced and injured where such mines shall be worked, the said several proprietors, parties to these presents, and interested in the disposal of lands and mines under the circumstances aforesaid, having agreed with each other, and being willing and desirous to accept their respective allotments in their several situations hereinbefore declared, subject to any inconvenience or encumbrance which may arise from the cause aforesaid; so nevertheless as that nothing *herein contained shall extend or be construed to extend to authorize or enable any of the parties for the time being entitled to the said mines to sink pits in the allotments under which the same are situate, for the purpose of working the said mines, without the consent of the then owners of the surface of the same allotments previously obtained, or in any manner to dig or break the said surface without the like consent."

[*596

[*597

If the Court shall be of opinion that the defendant is liable for the injury done to the plaintiff's land and buildings in the first count mentioned, or his land in the second count mentioned, the verdict is to be entered for the plaintiff for 300*l.* upon one or both counts accordingly: subject to a reference to Thomas Hardy, of Chilvers Coton, in the county of Warwick, builder, as to the amount of damages eventually sustained by the plaintiff. Should the opinion of the Court be adverse

to the plaintiff on both or either of the above points, as to both counts or either of them, the verdict is to be entered for the defendant upon one or both counts accordingly.

Hayes, Serjt., now(*a*) argued for the plaintiff. The plaintiff, being owner of the surface, has a primâ facie right to support for the land in its natural state; Humphries *v.* Brogden, 12 Q. B. 739 (E. C. L. R. vol. 64).(*b*) Independently of that natural right, his houses have stood there for more than twenty years; and he has therefore, by user, acquired a right to support for them. The defendant sets up that the *598] natural right of the owner of the soil is altered by *the instrument of 1770; either by its operation as an award under the Enclosure Act, or as the deed of Pears, whose estate the plaintiff has. The commissioners, as such, had no jurisdiction to regulate the mode of mining; if, therefore, this deed binds the plaintiff it must be because the covenant of Pears runs with the land so as to bind his assigns. Covenants made by the owners that the land shall be used in a particular manner may often be enforced in equity against a purchaser with notice of the covenant, whether it, properly speaking, runs with the land or not; but this equity depends entirely upon notice; Smith's note(*c*) to Spencer's Case, 5 Rep. 16 a. There is nothing to show that the plaintiff, in this case, had notice of this instrument when he purchased; and, as the instrument is ninety years old, and the ordinary search for title does not extend beyond sixty years, the Court will not infer that he had notice. The covenant in this case is with the parties to the deed; and Howlett, whose estate the defendant has, was not a party to the deed. There was therefore no covenant, even with him, supposing that the benefit of such a covenant would run with his estate in the mines. Besides, even if there was an express formal covenant purporting to bind Pears and his assigns to Howlett and his assigns, the burthen of that covenant would not run with the land. In Keppell *v.* Bailey, 2 Myl. & K. 517, Lord Brougham, C., points out that the power of the owner of land to annex incidents to the property is and ought to be limited. Mr. Smith, in his note to Spencer's Case, after citing all the cases says: "Upon the whole, there appears to be no *599] authority for saying *that the *burden* of a covenant will run with the land in any case, except that of landlord and tenant; whilst the opinion of Lord Holt in Brewster *v.* Kitchin, 1 Ld. Raym. 317, 322,(*d*) that of Lord Brougham in Keppell *v.* Bailey, and the reason and convenience of the thing, all militate the other way." [Lord CAMPBELL, C. J.—Do you say that the owner in fee of land can in no way grant to the owner of the mines below it, and his assigns, the right

(*a*) Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, Js. Crompton, J., left the Court before the conclusion of the argument.

(*b*) See Roberts *v.* Haines, post, p. 643.

(*c*) 1 Smith's Lea. Ca. 63.

(*d*) S. C., as Brewster *v.* Kidgill, 12 Mod. 166.

to get them, at all times thereafter, without making subsequent compensation? This instrument may not be effectual: but could not a grant to that effect have been in some way made binding on the assigns of the land?] It would seem not. In Hilton *v.* Earl Granville, 5 Q. B. 701, 730 (E. C. L. R. vol. 48), the question was whether a custom within a manor for the lord to take the minerals, exactly as the defendant here claims to do, was valid. The custom would be valid if a grant creating it could be valid; but in the judgment in the Queen's Bench it is said: "Assuredly whatever the lord can reasonably be supposed to have reserved out of his grant the usage may adequately prove that he did reserve. But a claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd." There is no difference in principle between a reservation by the owner of the fee granting away the surface, which is the case supposed in Hilton *v.* Earl Granville, and a grant by the owner of the surface to the owner of the mines. But the question *does not arise here unless it can be shown that the burthen of this covenant runs with the land, and the benefit with the mines. [*600
Even then an easement has been acquired by the twenty years' enjoyment of support for the houses.

M. Smith, contrà.—It is not necessary to consider the doctrine as to covenants running with the land, as the defendant's claim does not depend upon that. The defendant claims no easement in the plaintiff's land; it is the plaintiff who claims an easement of support on the defendant's minerals. It is admitted by the defendant that, primâ facie, the owner of the upper stratum has a right to support upon the lower, if there is no evidenee of title to qualify their rights; Humphries *v.* Brogden, 12 Q. B. 739 (E. C. L. R. vol. 64). The defendant shows here that those under whom the plaintiff claims took the surface with a qualified right of support. In Smart *v.* Morton, 5 E. & B. 30, 47 (E. C. L. R. vol. 85), it is said in the judgment: "If the owner of a house were to convey it to another by deed reserving a lower story to himself, whatever powers he reserved for the enjoyment of this story, unless the right of support is renounced by the grantee of the superior stories, these powers must be considered as only meant to be exercised subject to this right being respected." Here Pears did renounce the right to support. It is by no means clear that it was beyond the powers of the commissioners enclosing the lands to allot them in allotments divided horizontally instead of, as is usual, vertically; but that need not be discussed, as Pears accepted the allotment on the terms mentioned in the deed, and Howlett accepted the mines on the same terms. It is true that Howlett did not execute *the deed; but that is not material. Pears, accepting the surface under such a conveyance, [*601

took it without the easement of support. Could he have sued Howlett for taking the minerals? If he could not, it must have because the easement of support was never created. If what is said in Hilton *v.* Earl Granville, 5 Q. B. 730 (E. C. L. R. vol. 48), merely means that the custom was unreasonable, in the sense that it was not one to be presumed, it does not touch the present question. If it means that a grant of this sort, expressly made in consideration of getting a larger allotment, is illegal, the remark was made obiter merely in that case, and surely cannot be supported. As to the houses, if there was no right of support for the surface in its natural state, it is difficult to see how one could be gained by loading it with houses.

Hayes, Serjt., was heard in reply. *Cur. adv. vult.*

Lord CAMPBELL, C. J., on a subsequent day (June 7), delivered judgment.

In this case, which was very ably argued on both sides, we think that the defendant is entitled to our judgment.

We adhere to the doctrine laid down by this Court in Humphries *v.* Brogden, that, where the surface of land and the minerals under it are held as separate tenements by different owners, of common right the owner of the surface is entitled to support from the subjacent strata, *602] without reference to the nature of the *strata, or the difficulty of propping up the surface. But we there expressly guarded ourselves against the supposition that we intended "to lay down any rule applicable to a case where the primâ facie rights and liabilities of the owner of the surface of the land and of the subjacent strata are varied by the production of title deeds or by other evidence." (*a*) In the present case we are of opinion that there is evidence to show that, upon the severance of the surface and the minerals, the owner of the surface took it as a separate tenement, without that continuing and unqualified right to support from the subjacent strata to which the owner of the surface would be *primâ facie* entitled. He had an easement for the support of the surface; but it was of a qualified character. There was a servitude imposed upon the owner of the minerals; but this servitude likewise was of a qualified character. Both easement and servitude were subject to the right of the owner of the minerals to work and get them in a careful manner, although the surface might thereby be injured. The owner of the surface had it conveyed to him with this qualified easement only; and with this qualified easement he was contented to accept it. Notwithstanding some expressions of Lord Denman, C. J., in Hilton *v.* Earl Granville, 5 Q. B. 701 (E. C. L. R. vol. 48), we are of opinion that upon the severance of the surface and the minerals into separate tenements, to be held by different owners, such an arrangement might effectually be made as to the right of support to the surface from the minerals. There is here nothing in derogation of

(*a*) 12 Q. B. 757 (E. C. L. R. vol. 64).

the grant of the *surface. The grantee of the surface may still hold in fee-simple with all the rights and incidents belonging to that estate. He would not have the perfect easement of support from the minerals: but this (as must be supposed for valuable consideration) he has been contented to waive; and he takes his tenement with an easement of support of a qualified character. No deceit is practised upon him; and no attempt is made to create an estate in law without the usual incidents belonging to that estate. Therefore no rule of law is violated. In Hilton *v.* Earl Granville, as well as in Harris *v.* Ryding, 5 M. & W. 60,† and in Smart *v.* Morton, 5 E. & B. 30 (E. C. L. R. vol. 85), it is taken for granted that such an arrangement would be valid, the owner of the minerals making compensation toties quoties to the owner of the surface for the damage done to the surface in working the minerals; but surely it can make no difference whether the owner of the surface is to be indemnified by subsequent payments, or by an advantage conferred upon him in respect of price which he pays, or by the extended area which he obtains, in consideration of the loss or inconvenience to which he may afterwards be subject from the subsidence of the surface by the working of the minerals. [*603

On these principles, Pears, the original allottee of the land in question, acquired his tenement with only the qualified right of support from the minerals; and he could have maintained no action against Howlett, the allottee of the minerals, for working them in a careful manner. Great stress was laid by my brother *Hayes* *upon the circumstance that Howlett never executed the award: but we do not consider this circumstance material: for the covenant of Pears does not appear to us to operate in the manner of a covenant running with the land. Looking to the whole award, the covenants contained in it, and the Act of parliament under which it was made, we think that Pears never had in him the easement for which the plaintiff contends; and, on the contrary, that the minerals vested in Howlett, with the right of working them contended for by the defendant, the servitude attached to his tenement being only such support to the surface as was consistent with working the minerals in a careful manner. There can be no doubt that a larger portion of the surface of the lands to be enclosed was allotted to Pears by reason of the subjacent minerals being allotted to another, with the right to work them without making compensation to the owner of the surface; and a smaller portion of the minerals would be allotted to Howlett in respect of the unlimited right of working them which was conferred upon him. [*604

If Pears had not the unqualified easement now contended for, we are of opinion that it has not been acquired by any subsequent owner of the surface. No subsequent deeds are in evidence to vary the rights of the parties; and the occupation and enjoyment of the surface and of the minerals has been perfectly consistent with the easement of support

being of the qualified character which we have supposed, leaving the owner of the minerals at liberty to work them in the manner intended by the award, to which the owner of the surface was an executing party.

*605] *My brother *Hayes*, contending less strenuously for a right of support to the land, urged that, at all events, a right to support had been acquired for the houses which had been erected upon the land, and which had stood upon it for more than twenty years before the subsidence complained of. It would be strange if the owner of the minerals, who might work them, although the surface in its natural state might be injured by subsidence, could be prevented from doing so by the owner of the surface erecting upon it houses which he (the owner of the minerals) could in no way disturb. But we are clearly of opinion that in this case there is no evidence from which a lost grant from the owner of the minerals to the owner of the surface can be lawfully presumed, and that there is no evidence of enjoyment as of right from which the easement can be claimed under Lord Tenterden's Act.(*a*)

For these reasons we think that the plaintiff has not in him the easement which is the foundation of the present action: and we give judgment for the defendant. Judgment for the defendant.

(*a*) 2 & 3 W. 4, c. 71.

*606] *POAD *v.* JOHN WATSON the Elder and JOHN WATSON the Younger. [*May* 30, 1855.]

Testator, in 1794, devised lands at H. to trustees and their heirs, in trust for the use of his daughter for life, and after her decease upon trust and to the use of the heirs of her body, remainders over; and that, if his daughter should marry, her husband should not meddle, and her receipts should be sufficient discharges to the trustees. After bequeathing certain legacies, to be paid twelve months after his decease, testator bequeathed all his personal estate to the said trustees, in trust to sell and apply the proceeds to the payment of the said legacies and of his debts, so far as the same would extend. He then devised as follows: "I do hereby order and direct, that the surplus of the rents and profits of my real estates by me hereinabove devised, over and above what shall be laid out" by the said trustees in maintenance of my said daughter during her minority, shall be applied during her minority "in and towards further payment of the said" several legacies and debts; "and, in case the provisions by me above made" for the payment of the legacies and debts "be insufficient for that purpose," "I do hereby charge all and singular the said lands," &c., "at H. aforesaid with and to the payment of such deficiency." "And also that it shall and may be lawful for" the trustees, "by and out of the same premises hereby devised to them respectively, to deduct and reimburse him and themselves respectively all such loss, costs, charges, and expenses as he or they or any of them shall pay, sustain, expend, or be put unto for or by reason of the performance of this my will, or the trusts hereby in them reposed, or the management and execution thereof respectively, or any other thing in anywise relating thereto."

The trustees, finding 300*l.* due to them on their trust account, borrowed that sum, and, in 1802, mortgaged the lands at H. for the term of one thousand years, by way of security. This was paid off in 1803, but the term was never surrendered.

In 1842, the daughter and her husband mortgaged the premises; and the term of 1802 was

assigned in trust for the mortgagee. The daughter having died, her son and heir at law brought ejectment.

Held, by the Queen's Bench, that the legal estate was in the trustees under the will, and, consequently, that the plaintiff's action failed.

Held, by the Exchequer Chamber affirming the judgment of the Queen's Bench, that the legal estate was not in the plaintiff; Williams, J., grounding his judgment, not specially on the estate being in the trustees, but generally on the existence of the term.

A WRIT of ejectment was issued, on 5th May, 1854, at the suit of the above-named, claimant, directed to the above-named defendants, who are in possession of certain messuages and hereditaments at Hartoft, in the county of York. The defendants appeared to the writ: and, Martha Rooke and Thomas Morley Rooke having been allowed to appear and defend the possession of the said property, a case was stated for the opinion of the Court, under the provisions of the Common Law Procedure Act, 1852. The case was substantially as follows.

*Robert Wilkes, being seised in fee of certain messuages and hereditaments, including the premises in question, on 4th September, 1794, duly made his will, the material part of which was as follows. [*607

"First: I give and devise unto my brother-in-law Gawin Pickering, and my good friend the Reverend Robert Skelton," "all those my freehold messuages, farms, lands, tithes, hereditaments, and premises whatsoever, with the appurtenances thereto belonging, situate," &c. (setting out all the premises of which he was seised in fee), "to hold to them and their heirs for ever: in trust nevertheless and for the only proper use and behoof of my daughter, Elizabeth Wilkes, for and during the term of her natural life, without impeachment of waste: from and immediately after her decease, then upon trust and to the use and behoof of the heirs of the body of my said daughter lawfully to be begotten: and, for want of such heirs, or in case of failure of such issue by my said daughter, then upon trust and for the use and behoof of my brother John Wilkes, and his assigns, for and during the term of his natural life: and, from and after his decease, then upon this further trust, and to and for the only proper use and behoof of my six nephews and nieces following" (mentioning them by name), "as tenants in common and not as joint tenants, their respective heirs and assigns for ever: and, in case my said daughter shall at any time happen to marry, it is my express will and mind that her husband shall not intermeddle with or have any disposing power over the estates herein by me given in trust for my said daughter, but that her own receipt and receipts alone, notwithstanding her coverture, shall, from time to time, be full and effectual discharges to my said trustees for *all moneys, rents, and effects paid and accounted for by them to my said daughter." [*608 The testator then bequeathed legacies to several persons "to be paid at the end of twelve calendar months next after my decease. And, as to all the rest, residue, and remainder of my personal estate and

effects, whatsoever and wheresoever, I give and bequeath the same to the said Gawin Pickering and Robert Skelton, in trust to sell and dispose of the same, and the moneys to arise by such sale and disposition thereof to be by them paid and applied in and towards the payment of the several legacies above mentioned, and of all my just debts, so far as the same will extend: and it is my will, and I do hereby order and direct, that the surplus of the rents and profits of my real estates by me hereinabove devised, over and above what shall be laid out and expended by my said trustees in the maintenance and education of my said daughter during her minority, shall in like manner be paid and applied by the said trustees, during her minority, in and towards further payment of the said several legacies above mentioned and of my just debts: and, in case the provisions by me above made for payment of the said several legacies above mentioned, and of all my debts, be insufficient for that purpose, then and in such case, and in order to supply the deficiency, I do hereby charge all and singular the said lands, tenements, and hereditaments at Hartoft aforesaid with and to the payment of such deficiency: and I do hereby make, ordain, constitute, and appoint the said Gawin Pickering and Robert Skelton joint executors of this my will, in trust for my said daughter, Elizabeth Wilkes; and I likewise nominate them, the said Gawin Pickering and Robert Skel-

*609] ton, to be tutors and guardians of my said *daughter during her minority. And, lastly, my will and mind further is, and I do hereby expressly declare, that my said trustees or either of them, their or either of their heirs, executors, or administrators, shall not be charged or chargeable with or accountable for more of the aforesaid moneys and estate than he or they shall actually receive, or shall come to his or their respective hands, by virtue of this my will, nor with or for any loss which shall happen of the said moneys and estates by me given to them, or any part thereof, so as such loss happen without their wilful neglect or default, nor the one of them for the other of them, or for the acts, deeds, receipts, defaults, or disbursements the one of the other; and also that it shall and may be lawful for them, my said trustees, and each of them, their and each of their heirs, executors, and administrators, in the first place, by and out of the same premises hereby devised to them respectively, to deduct and reimburse him and themselves respectively all such loss, costs, charges, and expenses as he or they or any of them shall pay, sustain, expend, or be put unto for or by reason of the performance of this my will, or the trusts hereby in them reposed, or the management and execution thereof respectively, or any other thing in anywise relating thereto. In witness," &c.

The testator died, without having revoked his will, while the daughter was a minor and unmarried. She came of age on 15th April, 1802, and afterwards married Isaac Poad, and had issue by him, of whom the eldest was the plaintiff.

On 12th April, 1802, by indenture of mortgage of that date, reciting, among other things, that Elizabeth Wilkes would attain her majority on the 15th April then *next, and that the trustees, having discharged the trusts of the will on her behalf, had found a debt [*610 or deficiency in their executorship and trust accounts of 300*l.*, the said trustees, in consideration of 300*l.* lent to them by one John Pickering, demised to the said John Pickering the premises at Hartoft for the term of one thousand years, to secure the repayment of the said sum of 300*l.*

On 13th June, 1803, by a memorandum of that date endorsed on the mortgage-deed, the said John Pickering acknowledged the receipt of the said sum of 300*l.* and interest from the said Isaac Poad, and thereby promised to execute an assignment or release of the said mortgage to the said Isaac Poad, or to whom he might appoint, at his request.

The case then stated that, by indentures of lease and release dated respectively 30th and 31st July, 1802, Isaac Poad, and Elizabeth his wife, conveyed the premises to one Robinson, that he might be tenant to the precipe, to a recovery to enure to such uses as Poad and Elizabeth his wife should jointly appoint; and, in default of appointment, to the use of Poad for life, remainder to Elizabeth for life, remainder to the children of the marriage as Poad and Elizabeth should jointly appoint; and in default of appointment to the children as tenants in common; in default of such issue to such uses as Elizabeth might, by will, appoint, with the ultimate remainder to her in fee. A recovery was suffered accordingly. Isaac Poad died in 1813. Elizabeth, his wife, the testator's daughter, survived him, and in 1815 married Jeremiah Wilkes. On 13th October, 1841, Jeremiah Wilkes, and Elizabeth his wife, executed a disentailing deed, under stat. 3 & 4 W. 4, c. 74, purporting *to convey the property in question to such uses as [*611 Elizabeth should by deed or will appoint.

The said term of one thousand years was never assigned or in any manner dealt with till 1842. On 31st January, 1842, by an indenture made between Jeremiah Wilkes and Elizabeth, his wife, of the first part, the said John Pickering of the second part, the said Rev. Robert Skelton of the third part, Thomas Hudson of the fifth part, and Robert Kitching of the sixth part, duly executed by all the parties except Skelton; after reciting the mortgage of 12th April, 1802, and that, though the money had been long since fully paid by Jeremiah Wilkes(*a*) to Pickering, no surrender or assignment had been made, Pickering, at the request of Jeremiah Wilkes and Elizabeth, his wife, assigned the term to Kitching, as a mortgage security for 1200*l.* lent to Jeremiah Wilkes and Elizabeth, his wife, by Hudson, and, subject thereto, in trust to attend the inheritance.

The title to this mortgage, after certain mesne conveyances, became

(*a*) Sic.

vested in the defendants, Martha Rooke and Thomas Morley Rooke. The term also, after certain mesne assignments, the first of which was in 1842 also, was assigned to a trustee for the same defendants. The mortgage-money not having been paid, the same defendants, as mortgagees, in 1846, entered into possession.

Jeremiah Wilkes died in 1847. Elizabeth, the daughter of the testator, and widow successively of Poad and Wilkes, died in 1854.

The plaintiff contended that, upon the death of his mother, Elizabeth, he was entitled to enter into possession, and receive the rents and profits
*612] of the property *situate at Hartoft, he being the eldest son and heir at law of the said Elizabeth Wilkes; or, if not entitled to the whole, then to the two-fifth parts thereof, namely, one-fifth as one of the five children of the said Elizabeth by her first marriage, and another fifth as heir at law of his brother Isaac Poad, who died intestate, and without issue, in 1847.

The defendants contended that the plaintiff was not so entitled to enter, because the legal estate in the premises was vested in the trustees appointed by the will of Robert Wilkes, or, if not in them, in the trustee of the term of one thousand years.

The question for the opinion of the Court was, Whether the plaintiff was entitled to recover the property at Hartoft devised by the will of the said Robert Wilkes.

The case was now argued in the Queen's Bench.

F. Bailey, for the plaintiff.—The question turns upon the construction of the will of the testator. The devise is to trustees and their heirs, to hold to them and their heirs, "In trust nevertheless and for the only proper use and behoof," and then follow devises. If there were no more, the effect of the Statute of Uses would be to execute the uses, and all the subsequently devised estates would be legal estates, the trustees having been mere devisees to uses. But, if there are, in a will, trusts to be performed which require that the trustees should have a legal estate, the use is so far not executed, but so far only. In Watson *v.* Pearson, 2 Exch.
*613] 581,† Parke B., in *delivering judgment, states the rule thus: "It is certainly true, that where the purposes of the trust on which an estate is devised to trustees are such as not to require a fee in them; as for instance where the trust is to pay annuities, or to pay over rents and profits to a party for life, there, if, subject to the specified trusts, the estate is given over, the parties taking under such devise over have been held to take legal estates: the estate given to the trustees (even when given with words of inheritance) having been in such cases taken to have been meant to be co-extensive only with the trust to be performed. This rule of construction has probably created much more difficulty than it has obviated. It is however too well settled to be now

(*a*) Before Lord Campbell, C. J., Coleridge, Erle, and Compton, Js. Crompton, J., left the Court before the conclusion of the argument.

called in question." The will, in the present case, provides that, in case the testator's daughter marry, her husband shall not have any power over the estates; that is sufficient to show that the legal estate must be in the trustees and their heirs during her life; and therefore they took the legal fee; but on her death the devise to the use of the heirs of her body would be executed by way of executory devise; Lady Jones *v.* Lord Say and Seal, 8 Vin. Abr. 262, *Devise* (C. b) 19, S. C. 3 Br. P. C. 113 (2d ed.), Doe dem. Compere *v.* Hicks, 7 T. R. 433, Harton *v.* Harton, 7 T. R. 652, Doe dem. Mueller *v.* Claridge, 6 Com. B. 641 (E. C. L. R. vol. 60). Then, Elizabeth being no more than equitable tenant for life, the recovery and the disentailing deed were both inoperative to bar the legal estate tail; Silvester dem. Law *v.* Wilson, 2 T. R. 444; and the plaintiff is entitled to the whole. It will be said that there are other trusts remaining to be executed after Elizabeth's death: but there are none requiring that the legal estate should continue in the *trustees. The charge of debts upon the land has not that effect; Kenrick *v.* Lord W. Beauclerk, 3 B. & P. 175, Warter *v.* Hutchinson, 1 B. & C. 721 (E. C. L. R. vol. 8). The latter case was, it is true, remarked upon in Doe dem. Cadogan *v.* Ewart, 7 A. & E. 636, 669 (E. C. L. R. vol. 34). The other side may probably rely upon Doe dem. Davies *v.* Davies, 1 Q. B. 430 (E. C. L. R. vol. 41); but there was, in that case, an express power to mortgage; a charge of debts gives no such power; Doe dem. Jones *v.* Hughes, 6 Exch. 223.† Barker *v.* Greenwood, 4 M. & W. 421,† turned upon the form of the expression "net" rents; a word which showed that the trustees were, in the first instance, to receive the rents. At most, the trustees, in this case, would only require the fee till the legacies and debts were paid; and a year would be enough. The charge of debts does not enlarge the estate previously given; East *v.* Twyford, 4 H. L. Ca. 517. Supposing that the legal life estate was executed in Elizabeth, the recovery was good, and the plaintiffs' claim would be confined to two-fifths of the premises. [*614

It will be said that, at all events, the term of 1802 is outstanding, and that, therefore, the plaintiff must fail. But, supposing that the term was well created originally, and that it would last after the decease of Elizabeth, both of which are doubtful points, it became, in 1803, a satisfied term. The mortgagees of 1842 were purchasers with notice of the will, and consequently of the defect in the title, and cannot therefore use the term; Willoughby *v.* Willoughby, 1 T. R. 763. A Court of equity would, under these circumstances, have restrained them from setting up the term against the plaintiff; and therefore *it ceased under stat. 8 & 9 Vict. c. 112; Cottrell *v.* Hughes, 15 Com. B. 532 (E. C. L. R. vol. 80). [*615

J. Gray, contrà.—If the construction of the will is that there was an equitable life estate in Elizabeth, and a legal estate tail in the heir of

her body, the defendants probably cannot use the term, for the reason suggested, as those, under whom they claim, had notice of the will. But, if the estate for life and the devise to the heir were either both legal or both equitable, so that Elizabeth was tenant in tail, the defect in the title would depend, not upon the will of which the purchasers had notice, but upon the recovery of which they had not notice; and the term protects them against the plaintiff's claim as to two fifths. But, if the true construction of the will is that the legal estate in fee is still in the trustees, the plaintiff must fail altogether. In Doe dem. Davies *v.* Davies, 1 Q. B. 430, 438 (E. C. L. R. vol. 41), Patteson, J., says: "Doe dem. Shelley *v.* Edlin, 4 A. & E. 582 (E. C. L. R. vol. 31), and Doe dem. Cadogan *v.* Ewart, 7 A. & E. 636 (E. C. L. R. vol. 34), lay down what the Court has, after much consideration, determined on review of the previous cases. If the devise be for purposes which are to last only for a certain time, the use of the word 'heirs' will not give a fee; the devise will be cut down to the time necessary for the purposes. But, if a fee be given in terms, with trusts which by their nature extend over an indefinite time, it is not so: if no particular time can be fixed at which the trusts shall end, the estate cannot be cut down." No subsequent case conflicts with that rule. Here the trustees are to pay the legacies twelve months after the testator's death: and they are, if the personal *estate falls short, to pay them out of the real estate. That shows that their estate was to last at least for a year, though Elizabeth might have died the day after the testator. It is true that a charge of debts gives no estate to the executor; Doe dem. Jones *v.* Hughes, 6 Exch. 223;† but when in the same will there is a devise to the executors in fee, the charge of debts shows that they are to keep the legal estate; Ball *v.* Harris, 4 Myl. & C. 264. It seems necessary therefore to rely upon the outstanding term.

*616]

Bayley, in reply.—In Blagrave *v.* Blagrave, 4 Exch. 550,† Parke, B., adopts the rule as laid down in Watson *v.* Pearson, 2 Exch. 581.† These cases are subsequent in date to Doe dem. Davies *v.* Davies, 1 Q. B. 430 (E. C. L. R. vol. 41).

Lord CAMPBELL, C. J.—It is clear that, if under this will the trustees took the legal fee simple, the plaintiff cannot maintain the action. It seems to me that, whether we adopt the rule in the terms used in Doe dem. Davies *v.* Davies, or in those used in Watson *v.* Pearson, the fee is in the trustees. The way in which the rule is laid down in Doe dem. Davies *v.* Davies seems to me to furnish a very sensible rule of construction, to which I should adhere, because it seems to me to be founded on principle, and calculated to produce certainty; the great object of all rules of construction. It is in effect that, where there is a devise to trustees and their heirs, we should give full effect to that limitation, unless there is something to show an intention to cut down

the fee simple to a smaller interest. In the *present case there is a devise to trustees and their heirs upon trusts, some of which will not certainly arise during the life of Elizabeth; and therefore the estate of the trustees cannot be cut down to an estate for life only. If it is cut down to anything else, what can it be? It was suggested it might be for twelve months after the death of the testator so as to allow the payment of the legacies; but an estate in fee for a year would be rather a novelty. If, instead, of adopting the rule in these terms, we take it in the terms used in the Exchequer, and ask whether the purposes "are such as not to require a fee," the question is the same. What smaller estate would answer these purposes? Therefore, taking either enunciation of the rule, the plaintiff has not the legal estate. [*617

COLERIDGE, J.—The only material question is, whether the trustees, under this will, took a legal fee; for if they did the plaintiff fails. I do not see any very material difference between the rule of construction as enunciated in the Exchequer and as enunciated in this Court. The paramount rule is to look to the intention as appearing on the whole will. But there are secondary rules, one of which is that the words of devise to trustees and their heirs are to have their natural effect to give a fee simple, unless something shows that it is cut down to an estate terminating at some time ascertained at the time of the testator's death. If no precise period for the termination can be shown, it remains an estate in fee.

ERLE, J.—There are words clearly meaning that the testator gave the trustees a fee simple; but, if a less estate *would certainly enable the trustees to fulfil all the trusts, the fee simple would be cut down to that estate. I examine this will; and I find several trusts which may go beyond the life of Elizabeth; and consequently no certain estate less than a fee simple will do. [*618

Judgment for defendant.

IN THE EXCHEQUER CHAMBER,

June 2, 1856.

ERROR was alleged by the plaintiff, in the above judgment, in the Exchequer Chamber. The defendant denied the allegation.

The case was now argued.

J. Rudall, for the plaintiff.—First, the term, even if it was one which the trustees had the power to create, ceased upon the death of the testator's daughter, that being the limit of their estate. The effect of the devise is to give them the legal estate during the life of the daughter only, she having the equitable estate, with contingent remainder in fee to the heirs of her body, who take as purchasers under the will; Lord Say and Seal *v.* Jones, 3 Bro. P. C. 113 (2d ed.), S. C. 8 Vin. Ab.

262, *Devise* (C. b) 19, Shapland *v.* Smith, 1 Bro. C. C. 74. Such an estate in the trustees is sufficient to enable them to carry into effect the trusts of the will; and therefore, unless the presumption be inconsistent with the obvious intention of the testator, it must be presumed that they take no larger estate; Ward *v.* Burbury, 18 Beav. 190, Ackland *v.* Pring, 2 M. & G. 937 (E. C. L. R. vol. 40), *Doe dem. White *v.* Simpson, 5 East, 162, Hawker *v.* Hawker, 3 B. & Ald. 537. [Jervis, C. J.—Those last two cases, I think, are no longer considered as law.] Doe dem. White *v.* Simpson may perhaps be considered to have been shaken by Doe dem. Tomkyns *v.* Willan, 2 B. & Ald. 84; but it has never been expressly overruled; and in Ackland *v.* Pring it is mentioned by the Court as the leading case on the point. In Ex parte Wynch, 5 De G. M. & G. 188, 221, 222, Lord Justice Turner was apparently of the same opinion. The defendants contend that, as the trustees are directed to pay the debts and legacies, and the real estates are charged with the payment of the residue of such debts and legacies if the personal estate should be insufficient for that purpose, the trustees must take a larger estate than for the life of the daughter. But this charge upon the real estates gives no express estate to the trustees; and, if the construction contended for by the defendants be held correct, the trustees could, to satisfy a debt, sell the lands over the head of the tenant for life. Doe dem. Jones *v.* Hughes, 6 Exch. 223,† is a direct authority against such a doctrine. That case was, no doubt, questioned by the Court in Robinson *v.* Lowater, 17 Beav. 592. [Williams, J.—There is a later case, Wrigley *v.* Sykes, 21 Beav. 337.] As to its being necessary that the trustees should have the fee, for the purpose of paying the debts, stat. 11 G. 4 & 1 W. 4, c. 47, s. 12, provides the mode in which a testator's debts are to be paid under a devise of this kind. It enacts "that where any lands, tenements, or hereditaments hath been

*619]

*620] or shall be devised in *settlement by any person or persons whose estate," by the Act, or by law, or by the will, "shall be liable to the payment of any of his or their debts, and by such devise shall be vested in any person or persons for life or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or may be vested in some person or persons from whom a conveyance or other assurance of the same cannot be obtained, or by way of executory devise, and a decree shall be made for the sale thereof for the payment of such debts or any of them, it shall be lawful for the Court by whom such decree shall be made to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey" "or otherwise assure the fee simple or other the whole interest or interests so to be sold to the purchaser or purchasers, or in such manner as the said Court shall think proper; and every such conveyance" or "assurance shall be as effectual as if the person" making it "were seised or possessed of the fee simple." [Williams, J.—The

Act does not mention the case of an equitable tenant for life.] Here the Court, upon a bill being filed, would have directed the trustees to convey the fee simple. [JERVIS, C. J.—You are begging the question, whether the trustees have merely a limited interest.] The authorities are clearly in favour of that construction. Next, even supposing that the trustees took a larger estate than the life of the daughter, they took only a chattel interest, determinable on fulfilment of the trusts; Cordal's Case, Cro. Eliz. 315;(a) and, upon the execution of the mortgage to secure the payment to them of the balance of *300*l.*, or, at all events, upon the payment of that sum by Poad in 1803, the [*621 trusts were all performed, and the estate of the trustees was at an end: so that, even if the term could exist beyond that time, at all events so much of the testator's estate, as was not comprised in the mortgage, vested in the plaintiff in fee. [JERVIS, C. J.—The term comprises all the property in dispute.]

But, next, whether the trustees took an estate for the life of the daughter, or a determinable chattel interest, the term itself is one which they had no power to create. It is not for the purpose of paying the debts or legacies, but to secure the repayment of money due to themselves. [WILLIAMS, J.—They are empowered to "reimburse" themselves out of the realty in respect of any charges incurred by them under the will. Can it be contended that this was not a good execution of that power?] At all events the term, upon the payment by Poad of the 300*l.*, was satisfied and at an end, the purpose for which it was created having been fulfilled. The money paid by Poad must be considered as a gift by him for the benefit of his wife. It may be presumed that the term was then surrendered; Doe dem. Bowerman *v.* Sybourn, 7 T. R. 2. [JERVIS, C. J.—The case expressly states that the term was not in any way interfered with until 1842; we cannot, therefore, presume a surrender at the time you suggest.] A surrender may be inferred from the memorandum endorsed on the deed of mortgage. [MARTIN, B.—You are asking us to repeal the Statute of Frauds.] Even if the term were not surrendered, it could not be set up again in 1842, after a lapse of forty years, contrary to the provisions of stat. 3 & 4 W. 4, c. 27.

**J. Gray*, contrà.—In construing the will, the Court will have regard to the state of events at the time when the will first came [*622 into operation. The construction to be put upon it could not depend on any event happening subsequently. At that time the objects of the will could not, with any certainty, be accomplished within the life of the daughter. She might have died a few days after the testator; and in that case, as the legacies and debts were not payable till a year after his death, an estate for the life of the daughter would not have been sufficient to enable the trustees to perform the trusts of the will, or to

(a) Cited in Manning's Case, 8 Rep. 94 b, 96 a.

reimburse themselves, as they are empowered to do, in respect of any charges incurred by them in executing the trusts. Doe dem. Davies *v.* Davies, 1 Q. B. 430 (E. C. L. R. vol. 41), is a direct authority in favour of the defendants. Ball *v.* Harris, 4 Myl. & C. 264, is also in point. [WILLIAMS, J.—In Doe dem. Davies *v.* Davies there was an express direction to the trustees to raise money upon the real estate; here there is merely a charge upon the property in case of a certain contingency. If the trustees here were expressly directed to pay the debts out of the real estate, no doubt they must take the fee.] They are, at all events, expressly directed to reimburse themselves; and they could not be certainly enabled to do that, unless they took the fee. And, even if there be only a charge and no direction to pay, the trustees take the fee where, as here, there are express words giving them an estate in fee simple; Rackham *v.* Siddall, 1 Macn. & G. 607, 615. That intention is clear here; and one strong presumption, in favour of such intention, arises from the fact that all the limitations in the will are introduced by

*623] words of trust. In Doe *dem. Shelley *v.* Edlin, 4 A. & E. 582, 590 (E. C. L. R. vol. 31), the Court, in giving judgment, explained and qualified the general rule that trustees take only such an estate as is sufficient to enable them to execute their trust, and observed that the cases in which that rule had been laid down and followed were cases where, upon the face of the instrument itself, and for the purpose of carrying the trusts into execution, and, in some instances, of carrying out also the obvious intention of the testator, it was necessary to hold that the trustees took such limited estate. None of these reasons for such a construction exist in the present case; in fact, the instrument itself, and the apparent intention of the testator, are expressly in favour of the trustees taking the fee. Doe dem. Cadogan *v.* Ewart, 7 A. & E. 636 (E. C. L. R. vol. 34), and Blagrave *v.* Blagrave, 4 Exch. 550,† are to the same effect.

J. Rudall, in reply.—The intention of the testator, gathered from the language of the will, is not, as the defendants contend, to give the trustees an estate in fee. In the bequest of the personalty, it is given to the trustees "in trust to sell and dispose of the same" for the payment of the legacies and debts: if the testator had intended to give the trustees an express trust as to the payments out of the realty, he would have used equally direct and explicit language. In Doe dem. Davies *v.* Davies, Doe dem. Cadogan *v.* Ewart, and Doe dem. Shelley *v.* Edlin, there was an express direction to deal with the realty given to the trustees. In Rackham *v.* Siddall, 1 Macn. & G. 607, there was a clear and express devise to the trustees.

*624] *JERVIS, C. J.—I am of opinion that the judgment of the Court below must be affirmed. It is unimportant, as regards the plaintiff's claim, whether the trustees took the legal estate in fee under the devise, or whether it gave them merely a power, under cer-

tain circumstances, to deal with the realty; for in either case there would be an outstanding estate which would bar the plaintiff. But I am of opinion that the trustees did take the legal estate in fee. The words of the actual devise to them, if standing alone, would probably, as has been contended, put them merely in the position of conduit pipes; and, even taking into consideration the trusts in favour of the daughter, they might be held to take an estate in fee for her life only, the equitable estate being in her, with an executory devise over to the heirs of her body. But, in a later part of the will, comes the provision "that it shall and may be lawful for" the trustees, "and each of them, their and each of their heirs, executors, and administrators," "out of the same premises hereby devised to them respectively to deduct and reimburse him and themselves respectively" all charges and expenses incurred by them in carrying out the trusts of the will. So that we have, first, an express devise of land to them in fee, and then a provision that they may deal with such land, so devised to them, for the purpose of reimbursing themselves. That is different from a mere charging of the land for that purpose, without a previous express devise, in which case the trustees would have had a power only: here the language of the will is sufficient to give them a legal estate in fee; and there is no reason why we should cut such estate down to a mere power. Judgment will therefore be for the defendants.

*WILLIAMS, J.—I also am of opinion that the defendants are entitled to our judgment, though not exactly for the same reasons as those given by the Lord Chief Justice. I prefer to rest my decision upon the ground that the will at all events gave a power to the trustees to deal with the realty; that that power was well executed by them in the creation of the term; that that term is still in existence, inasmuch as we cannot presume it to have been surrendered; and that therefore the plaintiff's claim is barred. [*625

POLLOCK, C. B., CRESSWELL, J., MARTIN, B., CROWDER, J., WILLES, J., and BRAMWELL, B., concurred in affirming the judgment.

Judgment affirmed.(a)

(a) The case in the Exchequer Chamber is reported by Francis Ellis, Esq.

RICHARD CHAMBERLAYNE *v.* ELIZABETH CHAMBERLAYNE. [*Feb.* 23, 1856.]

Devise of freeholds to A., "to hold to him and the heir male of his body lawfully begotten, and the heirs and assigns of such heir male for ever;" "but, in case" A. "shall happen to die without leaving any son of his body lawfully begotten," then to B., "his heirs and assigns for ever," subject to the payment by B. of 300*l.* to the daughters of A., or such of them as should be living at his decease."

Held, in the Exch. Ch., affirming the judgment of Q. B., that A. took an estate for life, with contingent remainder in fee to such heir male of A. as should be living at the time of his decease; and, failing such heir, to B. in fee.

THIS was an action of ejectment, in which the claimant claimed to have been entitled, on 8th January, 1855, to the possession of certain freehold lands and hereditaments, situate at Moreton Valence, in the county of Gloucester, called Grove Cottage Farm. The defendant *626] appeared thereto; and, with the consent of *the parties, and by an order of Erle, J., pursuant to The Common Law Procedure Act, 1852, a case was stated for the opinion of the Court, which was substantially as follows.

Richard Chamberlayne, being seised in fee simple of the freehold lands and hereditaments in question, on 16th September, 1833, made his will, of which the following is the part material for the decision of the present question.

"I give, devise, and bequeath unto my son Joseph Chamberlayne all that my freehold messuage or dwelling-house, together with the outbuildings, lands, hereditaments, and premises thereunto belonging, called Grove Cottage Farm, situate," &c., "to hold to him and the heir male of his body lawfully begotten, and the heirs and assigns of such heir male for ever; subject nevertheless, and I hereby charge such messuage, lands, hereditaments, and premises with the payment of five shillings weekly, and every week, from the day of my decease, unto my daughter Esther, the wife of Thomas Smith, for and during the term of her natural life, the same not to be subject or liable to the debts, control, or engagements of her said husband, and her receipt alone to be a discharge for the same: and, upon the decease of the said Esther Smith, I charge the same hereditaments and premises with the payment of nineteen guineas to each of her children that shall be living at the time of her decease: and I also charge and subject the same hereditaments and premises to the payment of five shillings weekly, and every week, from the day of my decease, unto my wife, for and during the term of her natural life." The testator then, after directing that his wife *627] should have the right to use and *occupy part of the said dwelling-house and furniture, devised as follows: "my will is that, in case my said son Joseph shall happen to die without leaving any son of his body lawfully begotten, then, and in that event, I give, devise, and bequeath the said messuage, farm, lands, and hereditaments unto my son Richard Chamberlayne, his heirs and assigns for ever; but subject nevertheless, not only to the charges and payments hereinbefore made thereupon and thereout, but also subject and charged with the payment by my said son Richard of 300*l.* unto the daughters of my said son Joseph, or to such of them as shall be living at the time of his decease, in equal shares and proportions; and, if there shall be but one such daughter, then the whole to such only daughter." After making various other bequests, the testator devised as follows: "And as to all moneys in the house," &c., "and all other my real and personal estate not hereinbefore disposed of, I give and bequeath the same and every

part thereof unto all my children, except my sons Joseph and Edward, and my daughter Esther (whom I have otherwise provided for in this my will), to be equally divided among them, share and share alike, and the issue of either of my said children that shall be dead at the time of my decease to take the share of his or their deceased parent."

On 8th October, 1834, the said Richard Chamberlayne duly executed a codicil to the above-mentioned will, in which (reciting that his daughter Mary had died since the making of his said will) he made a fresh disposition of certain personal estate, not material to the merits of the present case.

On the 16th July, 1836, the said testator died without having revoked or altered his said will except by the *said codicil. At the time [*628 of his death the said testator left a widow and three sons, that is to say, the said Joseph Chamberlayne, the eldest son, Edward Chamberlayne, the second son, and the said Richard Chamberlayne (the claimant), the youngest son, and two daughters, Esther, wife of the said Thomas Smith, and Harriet Chamberlayne, him surviving: and his son Joseph Chamberlayne entered into possession of the premises in question, and, acting on the assumption that he had acquired an estate tail, and was actual tenant in possession of the premises in question under his father's will, on 12th October, 1836, under the advice of counsel, made and executed a disentailing deed under stat. 3 & 4 W. 4, c. 74, s. 15, which deed, except in so far as such deed may be affected by the circumstances in the case stated, did destroy the estate tail and the powers to take effect after the determination or in defeasance of such estate tail. The said Joseph Chamberlayne continued in possession of the premises in question up to 7th January, 1855, when he died, without ever having had a son, but having four daughters, three born during his father Richard Chamberlayne's lifetime, the youngest born afterwards. By his will, dated 24th November, 1836, the said Joseph Chamberlayne, on the assumption that he had barred the entail, and had acquired for himself the fee simple of the premises in question, appointed his wife executrix, and devised a life estate therein to his said wife Elizabeth Chamberlayne, the defendant, who is now, by her tenant, in possession of the premises. Richard Chamberlayne, the claimant, being the Richard Chamberlayne mentioned in the testator Richard Chamberlayne's will, claims the premises in question on the grounds that, under his *father Richard Chamberlayne's will, a [*629 life estate only passed to Joseph Chamberlayne, and not an estate tail, and that the disentailing deed above mentioned, executed by Joseph Chamberlayne, was wholly inoperative to give Joseph Chamberlayne an estate in fee simple.

The question for the opinion of the Court is: Was Richard Chamberlayne entitled to the possession of The Grove Cottage Farm under his father's will, and under the circumstances above mentioned? If

the Court shall be of opinion that he was entitled, judgment, by confession, to be entered for the claimant; if they shall be of opinion that he was not so entitled, judgment of nolle prosequi to be entered.

The case was argued, in the Court of Queen's Bench, in last Hilary Term,(*a*) by *J. Gray*, for the plaintiff, and *Hannen*, for the defendant. It is considered sufficient to refer to the argument in the Court of Exchequer Chamber, and to the judgments of the two Courts.

Cur. adv. vult.

CROMPTON, J., in the following Vacation (February 23d), delivered the judgment of the Court.

In this case the testator, by a will dated in 1833, devised the freehold dwelling-house in which he resided, with land, &c., unto his son Joseph Chamberlayne, to hold to him and the heir male of his body lawfully begotten, and the heirs male of such heir male for ever, subject to a charge of 5*s*. per week, from the day of his decease, to his daughter Esther during the term of her natural life, and, after her death, to a charge of 19*l*. 19*s*. to each of her children that should be then living; and also *subject to a charge of 5*s*. a week to his wife during the term of her natural life; and with the direction that his wife should have the exclusive use of a bed-room, and the use, when she thought proper, of the kitchen in the dwelling-house. The will then proceeded as follows. But "my will is that, in case my said son Joseph shall happen to die without leaving any son of his body lawfully begotten, then and in that event I give, devise, and bequeath the said messuage," &c., "unto my son Richard Chamberlayne, his heirs and assigns for ever; but subject nevertheless, not only to the charges and payments hereinbefore made thereupon and thereout, but also subject and charged with the payment by my said son Richard of 300*l*. unto the daughters of my said son Joseph, or to such of them as shall be living at the time of his decease, in equal shares and proportions; and, if there shall be but one such daughter, then the whole to such only daughter." The testator left three sons, Joseph, Edward, and Richard, and two daughters. Joseph conceiving himself to be tenant in tail male, executed a disentailing deed: and the question for our decision is, Whether he was tenant in tail or tenant for life only, in which latter case Richard, the claimant in ejectment, would have become entitled on the death of Joseph, who died in 1855 without ever having had a son, and leaving daughters only.

*630]

It was contended, on the part of the plaintiff, that the devise to the heir male of the body in the singular with a devise over to the heirs and assigns of such heir male, would fall within the rule in Archer's Case, 1 Rep. 66 a. On the other side, it was pointed out that the original devise *was to Joseph; and that the words "heir male of his body, and the heirs," &c., "of such heir male," occur

*631]

(*a*) January 26th. Before Lord Campbell, C. J., Wightman and Crompton, Js.

only under the habendum, "to hold to him and the heir male," &c.: as if the whole estate was to be given to him, and the words as to heirs, &c., were only to show what the estate limited to him was to be. Probably the fact of the words as to the heir male, &c., occurring in the habendum only would not, in a will, be taken as sufficient to countervail the inference of intention arising from the use of the word heir male of the body in the singular with an express limitation over, not to heirs of the body, but to the heirs and assigns of such heir male.

Another point more relied on was the absence of an express estate for life to Joseph: and this, it was said, was sufficient to distinguish the present from Archer's Case, and the class of cases decided on the authority of that case, ending with the case of Willis *v.* Hiscox, 4 M. & Cr. 197, before Lord Cottenham.

It was said that in all these cases, except the case of Lowe *v.* Davies, 2 Ld. Raym. 1561, where the limitations were to the first and other sons in succession, there was an express life estate given in the first instance. This, however, seems hardly sufficient to take the case out of the effect of a rule founded on an intention manifested by the testator, of making the person who shall fill the character of heir male the origin or stirps of a new line of descent differing from the one which would arise from the use of the words heir male of the body, or heirs male of the body. And, in Lowe *v.* Davies, the first words would clearly have given an estate tail; and subsequent words, showing that the sons were to be *the origin of a new estate tail, were allowed to control the first clear words of inheritance, "heirs of the body," not "heir" in the singular, as in the present case. And the argument of there being no express life estate was there relied on at the bar, but did not prevail with the Court. [*632

To explain this devise in the present case, each party relied on that part of the will which gave the estate over to Richard on Joseph happening to die without leaving any son of his body lawfully begotten. The one side construed the word "son" as "general issue male," and treated the limitation over as on a general indefinite failure of issue male: whilst the other party treated the limitation as one that must take effect on Joseph dying without leaving issue male at his death. The defendant argued that the word "son" could not be construed in so strict a sense; as, in that case, if an eldest son of Joseph had died in his lifetime leaving a son, the estate would not have passed to that son, which could hardly have been the intention of the testator. The word "son" often means issue male generally, when such a construction corresponds best with the apparent intention: and, if it were necessary to construe the words "without leaving a son," &c., either as an indefinite failure of issue, or as confined to the dying without leaving a son in the strictest sense of the word, there might be considerable difficulty in attributing the latter meaning to the expression. The word, how-

ever, may well be construed, consistently with the first limitation, as "heir male of the body." And, if more consistent with the intention of the testator to be collected from the will, we should have no hesitation in construing the word "son of his body lawfully begotten," in this clause, *as meaning the same as the expression "heir male of the body" in the original limitation. *633]

This second clause, therefore, as well as the first, is capable of either of the constructions sought to be put upon the devise by the respective parties.

The only other part of the will which can be looked to, as furnishing any assistance in the construction of the devise in question, is the part immediately following the devise over to Richard, which creates the charge in favor of the daughters of Joseph. The premises are devised over to Richard Chamberlayne, his heirs and assigns, but subject, not only to the before-mentioned charges, "but also subject and charged with the payment by my said son Richard of 300*l.* unto the daughters of my said son Joseph, or to such of them as shall be living at the time of his decease, in equal shares and proportions; and, if there shall be but one such daughter, then the whole to such only daughter." This provision appears to contemplate the death of Joseph as the time for the vesting of the estatein Richard, subject to the charge in favour of such of the daughters of Joseph as shall be living at his death. The estate was then to go over, subject to that charge; and the objects of the charge were to be determined by the state of things at the death of Joseph. It is not perhaps absolutely inconsistent with the rest of the will that the objects of the testator's bounty as to the 300*l.* should be determined at the time of the death of Joseph, and that the estate should go over on the indefinite failure of issue at any time: but it is a much more probable construction, that the testator intended that the persons to take that bounty, to be paid by Richard, should be ascertained at the same time that the right to it accrued *and vested in Richard, at the death of Joseph; the charge being placed on Richard personally, and not on the estate, perhaps somewhat strengthens this view. *634]

We think that the best way of carrying out the intention of the testator, as expressed by the different parts of this will, is to hold that the devise in question was a devise to Joseph for life with a contingent remainder to the party, if any, who should answer the description of the heir male of his body at his death. By this construction we give effect to every provision and every word of the will, and are not obliged, as we should by the other suggested construction, to reject any part.

We give effect, first, to the expression "heir male" in the singular, which, being repeated in the next limitation, can hardly be treated as having been used by accident: we also give effect to the limitation in fee to the heir male of the body; whereas, on the other construction,

we must entirely reject the words "and to his heirs and assigns for ever;" which would certainly be doing great violence to a devise so clearly expressed as this is by the repeated use of the word "heir" in the singular, and by the addition of the words of the limitation in fee.

We give, also, proper effect to the word son, which may well mean the particular grandson or future issue male of the body, as well as the collective issue which it is often construed to mean. And we also give what seems to us the proper effect to the clause as to the charge over of the 300*l.*

We think, therefore, that our judgment should be for the plaintiff.

Judgment for the plaintiff.

---

*IN THE EXCHEQUER CHAMBER. [*635

June 2.

THE defendant alleged error in the Exchequer Chamber. The plaintiff denied the allegation.

Hannen, for the plaintiff in error.—It is clear, both from the language of the actual devise to him, and from that of the devise over, that Joseph Chamberlayne took an estate tail under the will. First, as to the devise itself. It is "to him and the heir male of his body lawfully begotten, and to the heirs and assigns of such heir male for ever." If the testator had intended to give him only an estate for life, the will would have contained an express devise to that effect. In Archer's Case, 1 Rep. 66 a, which will be relied on by the other side, there was an express devise of a life estate, which is given by the Court as one of the grounds of their judgment. The same observation applies to Luddington *v.* Kime, 1 Ld. Raym. 203, and Shaw *v.* Weigh, 2 Strange, 798, which will probably be cited for the defendant in error. And, in those cases, besides an express devise for life, the words "without impeachment of waste" and "without committing waste" were used, and were relied on by the Court in giving judgment. Even such express devise has not always been held to limit the estate of the ancestor to one for life. In Clerk *v.* Day, Cro. Eliz. 313, where the testator devised to his daughter for life, and, if she married after his death, and had *"heir of her body," then to such heir, the Court was divided in opinion, the Chief Justice holding that the daughter [*636 took an estate tail, notwithstanding the express devise for life: and the rest of the Court seem to have based their decision, that she took an estate for life only, solely on the fact of such express devise. And in King *v.* Melling, 2 Vent. 225, where the testator devised to his son for life, and after his decease to the issue of his body lawfully begotten, and for want of such issue to J. M. and his heirs, Lord Hale, after much consideration, as he states, held that the son took an estate tail. But, at all events, in the absence of an express devise for life, the words

"heir male" are words of limitation. They have never, under these circumstances, been held to be words of purchase, except where their technical meaning is controlled or explained by subsequent words in the will, as in Lowe *v.* Davies, 2 Ld. Raym. 1561, and in Goodtitle *v.* Herring, 1 East, 264, which is commented on in East *v.* Twyford, 4 H. L. Ca. 517. But here there are no such qualifying words. A distinction may perhaps be attempted between "heirs" and "heir." But the word heir, in the singular, is primarily a word of limitation. In Burley's Case, 2 Vent. 230, cited by Lord Hale in King *v.* Melling, a devise to A. for life, remainder "to the next heir male," and in default of such heir male, remainder over, was held to create an estate tail in A. Richards *v.* Bergavenny, 2 Vern. 324, is an authority for the plaintiff in error. There a devise to B. "and such heir of her body as should be living at her death," and, in default of such, remainder over, was held to give an estate tail to B. It is contended, on the other side, *that the effect of the words "heir male" is controlled by the subsequent words: "And the heirs and assigns of such heir male for ever." But those words are merely formal, and cannot, at all events, be held to alter the course of succession. In Fearne On Contingent Remainders, p. 183, it is said that "where the first words give an estate tail general, and the words engrafted thereon are words serving to limit the fee," "the annexed words of limitation are not to be attended to." And in Powell On Devises, Vol. I. p. 304 (3d ed.), it is laid down that, "neither words of limitation superadded on the word 'heir' in the singular number, nor the words first, next, or eldest preceding the word 'heir,' are sufficient to show an intent in the testator to control its technical import." Willis *v.* Hiscox, 4 M. & C. 197, will perhaps be relied on. But there, again, there was an express devise for life in the first instance. And in Goodright *v.* Pullyn, 2 Ld. Raym. 1437, a devise to A. for life, and after his decease "to the heirs males of the body of the said A. and his heirs for ever," was held to give an estate tail to A., notwithstanding even the express devise for life in the first instance. Denn *v.* Puckey, 5 T. R. 299, Nash *v.* Coates, 3 B. & Ad. 839 (E. C. L. R. vol. 23), and Toller *v.* Attwood, 15 Q. B. 929 (E. C. L. R. vol. 69), are to the same effect. Lord Coke, in C. Litt. 22 a, gives, as an instance of what he calls a "coarcted or restrained" estate tail, a still stronger case, namely, a devise to a man and his wife, "and to one heir of their bodies lawfully begotten, and to one heir of the body of that heir only." And in Dubber *v.* Trollope, Ambl. 453, a devise to T. for life, remainder to his first son for life, remainder to the right heirs male of his body, remainders over, *and after to his first heir male of his body, and, in default of such heir male, over, was held to give T. an estate tail male.

*637]

*638]

Next, the context of the will shows, by implication, that it was the testator's intention that Joseph Chamberlayne should take an estate

tail. The will provides that, "in case my said son Joseph shall happen to die without leaving any son of his body lawfully begotten," the lands are to go to Richard Chamberlayne in fee, subject, among other charges, to the payment by him of 300*l.* to the daughters of Joseph. Now, in order to make this part of the will consistent with the previous devise to Joseph and the heir male of his body lawfully begotten, the word "son" must be construed as "heir," or the word "heir" as "son." If the word "heir" mean "son," still, as Joseph had no son at the time of the devise, the limitation to Joseph and his son would give Joseph an estate tail, according to the rule laid down in Wild's Case, 6 Rep. 16 a. But the proper construction of the will is to read "son" as "issue male," as in Mellish *v.* Mellish, 2 B. & C. 520 (E. C. L. R. vol. 9).

In Bifield's Case, 2 Vent. 230, cited in King *v.* Melling, 2 Vent. 225, where the devise was to A., "and if he dies not leaving a son," remainder over, the word "son" was held to be used as nomen collectivum, and A. was held to take an estate tail. It is clear that it could not have been the testator's intention not to provide for a grandson of Joseph, if Joseph should have a son who died in his father's lifetime, leaving issue. The Court below, in giving judgment, allowed that the word "son" might fairly be construed as issue male. Then, what is the meaning of the words "die without leaving?" It is contended, by *the other side, that these words mean, die without leaving at the time of his death (that being an open question, as the will was made before the Wills Act, 7 W. 4 & 1 Vict. c. 26), and that therefore, as Joseph left no son at the time of his death, never, in fact, having had one, the limitation over to Richard took effect. The charge in favour of the daughters of Joseph is relied on in support of this construction, as showing that the testator had in contemplation the death of Joseph, without leaving a son at the time of his death, as the period at which the estate was to vest in Richard; inasmuch as, otherwise, the payment of the 300*l.* might be indefinitely prolonged, and the daughters might not live to receive it. But this argument was held, in Doe dem. Todd *v.* Duesbury, 8 M. & W. 514,† to be fallacious. And in Denn dem. Geering *v.* Shenton, Cowper, 410, a charge of this kind was not allowed so to limit the effect of the words "die without leaving issue of his body." In fact, the existence of the charge is in favour of the wider construction of the words in question. It shows that the testator intended to exclude, upon Joseph's death, not only Edward, the eldest son, but the daughters of Joseph, from the estate. But, if, as is contended by the other side, an estate in fee passed, immediately upon the death of Joseph, to the person fulfilling the designation of heir male of Joseph, it would, in the event of the death of such person intestate and without heirs, devolve upon the daughters of Joseph, or on Edward, before Richard, contrary to the intention of the testator. The inference, therefore, upon the whole, is that the words "in case my said son

[*639

*640] Joseph shall happen to die without leaving any son of his body *lawfully begotten," must be construed as meaning, in case of a general failure of male descendants of Joseph. This construction is in accordance with the decision in Doe dem. Cadogan *v.* Ewart, 7 A. & E. 636 (E. C. L. R. vol. 34), where all the cases in point, up to that time, are commented on, and the cases of Target *v.* Gaunt, 1 P. Wms. 431, and Forth *v.* Chapman, 1 P. Wms. 663, both to the same effect, are supported by the Court. Those two cases are particularly important, as showing the distinction which is to be drawn, as regards the effect of such a proviso as this, between a devise of personalty and a devise of realty. Stanley *v.* Lennard, Ambler, 355, is a still stronger case in favour of the plaintiff in error. There the devise was to S. for life, remainder to his eldest son and his issue male, "and for want of issue" of S., remainder over; and it was held that the words "for want of issue" meant for want of issue generally.

The effect of the will, therefore, is to create an estate tail in Joseph, both directly, by the words of the devise to him and the heir male of his body, and by implication, from the devise over assigning the failure of Joseph's male descendants as the time at which the remainderman is to take.

J. Gray, contrà, was not called upon.

Jervis, C. J.—I am of opinion that the judgment of the Court of Queen's Bench must be affirmed. It is not necessary, in deciding the question before us, to discuss the cases which have been cited on behalf of the plaintiff in error, and on which a very learned argument

*641] has been raised; for the objections put forward in that *argument against the construction adopted by the Court below, though individually of some force, cannot stand against the obvious intention of the testator as shown by the will itself. It has been argued that the words, "and the heirs and assigns of such heir male for ever," following the limitation to "the heir male" of the body of Joseph, may be rejected altogether. No doubt there are cases in which such words have been properly rejected; but there is nothing which calls for their rejection here; no rule of law is broken by giving them effect; no inconsistency is introduced into the provisions of the will; nor are any conflicting estates created, as in the cases cited. And, unless we reject those words, we cannot reasonably come to any other conclusion than that Joseph took an estate for life, with contingent remainder in fee to the heir male of his body, if there were such heir male living at the time of his death; if there were none such, then to Richard in fee.

Pollock, C. B., concurred.

Cresswell, J.—I am of the same opinion. Here, as was said by the Court in Lowe *v.* Davies, 2 Ld. Raym. 1561, the whole will must be taken together, and one part explained by the other. Looking at the general intention of the testator, as apparent in the will, it is clear

that the construction given to the devise by the Court below is correct.

WILLIAMS, J.—I am of the same opinion. It has been argued that, in the cases cited to show that a *devise of this kind gave an estate for life only to the first taker, there was an express estate for life given him in the first instance. But no reason has been shown why such express devise should make any difference in the construction of the whole limitation; and I do not think that it does. Then, this case is governed by Archer's Case, 1 Rep. 66 a, and the cases founded upon it. As to rejecting the words "and the heirs and assigns of such heir male for ever," that could be done only where the giving effect to them would create conflicting estates, or be repugnant to the general intention of the testator. Neither of these difficulties exists in the present case. [*642

MARTIN, B.—I am of the same opinion. The best method of ascertaining the true construction of a will, as of any other document, is to gather the intention from the language of the instrument itself, independently of any conclusions drawn from the construction of other documents more or less similar. I have no doubt that the Court below have drawn the proper inference as to the intention of the testator in the present case.

WILLES, J., and BRAMWELL, B., concurred.

Judgment affirmed.(*a*)

(*a*) The case in the Exchequer Chamber is reported by Francis Ellis, Esq.

*ROBERTS, FEREDAY, and SMITH, *v.* HAINES. [*643

June 2.

An enclosure Act gave power to allot commons and waste lands in the manor of W. It recited that J. was lord of the manor, and entitled to the soil of the commons and waste lands, and enacted that it should be lawful for J., and the lord of the manor for the time being, and his agents, &c., to come upon the commons and waste lands, to search for and get coal, erect works, and make bricks, making compensation to any person whose allotment should be damaged.

Agreed: that this conferred no power on the lord so to work the mines as to destroy the support of the surface.

It was also enacted that the lord should not open any work on the surface within forty yards of any dwelling-house, now or hereafter to be erected, nor get any coal or iron-stone under such dwelling-house within the perpendicular distance of forty yards from the foundation; and that persons entitled to such dwelling-houses might enter the mines to discover the perpendicular distance of the dwelling-houses from the mines, and, if the mines were within the perpendicular distance of forty yards from the buildings, so as to endanger them, might repair and secure the buildings at the expense of the lord.

The lord having worked the mines at a greater perpendicular distance than forty yards from a dwelling-house, and thereby injured it,

Held: that he was liable to an action, the Act not interfering with the common law right of the owner of the surface to the support of the subjacent strata.

THE declaration alleged that, before and at the time of the committing, &c., certain messuages, yards, gardens, and appurtenances, situate

at West Bromwich, in Staffordshire, were in the possession and occupation of certain persons respectively as tenants thereof to plaintiffs, the reversion of the same then and still belonging to plaintiffs: and, before and at the times aforesaid, there were certain foundations belonging to and supporting the said messuages, &c., which plaintiffs, for themselves and their tenants of the same messuages, &c., respectively, of right had enjoyed, and were at the times aforesaid respectively of right enjoying, and still ought to enjoy, for the support of the said messuages, &c., without hindrance or disturbance from any person. Yet defendant, wrongfully and without the leave and license, and against the will of plaintiffs, so wrongfully, negligently, and carelessly and improperly, and without leaving any proper or sufficient support in

*644] that behalf, worked certain mines under ground, under, *near to, and adjoining the said messuages, &c., and in and under and near to the said foundations thereof, and got and dug for, and moved the coals, minerals, earth, stones, and other produce of the said mines, under, near to, and adjoining the same respectively, that, by reason of the premises, the said messuages, &c., have sunk, cracked, and given way, and become greatly dilapidated and injured, and are likely to, and will become untenanted and unfit for occupation, and greatly diminished in value: and plaintiffs have been and are, by reason of the premises, greatly prejudiced and aggrieved in their reversionary estate and interest of and in the same.

Pleas. 1. Not guilty.

2. That plaintiffs have not, for themselves and their tenants, of right enjoyed, nor were they at the times aforesaid respectively of right enjoying, nor still ought to enjoy the said foundations, in manner and form as in the declaration alleged.

3. That the said messuages, &c., in the declaration mentioned were not in the possession or occupation of certain persons respectively as tenants thereof to plaintiffs; nor did the reversion thereof belong to the plaintiffs, modo et formâ.

Issues were joined on these pleas.

On the trial, before Cresswell, J., at the last Staffordshire assizes, it appeared that the place mentioned in the declaration had formed part of the commons and waste land in the manor of West Bromwich. In 1801 an Act of Parliament was passed, 41 G. 3, (U. K.) c. 14, private: "For dividing, allotting, and enclosing the several open common fields,

*645] common pastures, *commons, and waste lands, within the manor and parish of West Bromwich, in the county of Stafford."

The preamble of the act recites, among other matters, as follows; p. 5:(a)

(a) The citations are given from a printed copy of the Act which was used in the argument: the sections in this copy are not numbered. The Reporters have been unable to discover any printed copy in which the sections are numbered.

"Whereas there are within the manor and parish of West Bromwich, in the county of Stafford, several open common fields, common pastures, commons, and waste lands, containing together, by estimation, three hundred and eighty-seven acres, or thereabouts:

"And whereas Jervoice Clarke Jervoice, Esquire, is lord of the manor of West Bromwich aforesaid, and as such is entitled to the soil of the said commons and waste lands."

The enactments material to the present case were as follows.

P. 56. "And be it further enacted, that it shall be lawful for the said Jervoice Clarke Jervoice, and the lord of the said manor for the time being, and his agents, servants, and workmen, from time to time and at all times hereafter, to come into and upon the said commons and waste lands hereby intended to be enclosed, or any part or parts thereof, either before or after the same shall be enclosed (except as hereinafter is mentioned) to search for, dig, get, and raise, any coal and ironstone lying and being in or under the commons and waste lands, and to erect any work or works for that purpose, and to dig and take earth for making and to make bricks for any such work or works, and to carry away and dispose of such coal and ironstone to and for his *and [*646
their own use, making full and complete satisfaction to the person or persons whose allotments shall be damaged or in any manner injured by the working, getting, having, taking,"

P. 57. "and carrying away the said mines of coal and ironstone, or making of bricks as aforesaid, and also putting the lands so to be entered upon as aforesaid, in the same state and condition as they were when entered upon, or as near thereto as the nature of the case will admit.

"And be it further enacted, that the lord of the said manor for the time being, or other person or persons as aforesaid, shall on no account whatsoever open, dig, sink, or carry on any work on the surface of the ground for getting coal and ironstone as aforesaid, within the distance of forty yards of any dwelling-house or dwelling-houses now or hereafter to be erected upon the said commons or waste lands, nor shall they get any coal or ironstone under any dwelling-house or dwelling-houses now or hereafter to be erected upon the said waste lands, within the perpendicular"

P. 58. "distance of forty yards of the foundation of any such buildings now or hereafter to be built as aforesaid, except as hereinafter mentioned.

"And, for the better discovering and bringing to justice all and every person and persons who shall or may open, dig, sink, or carry on any work for the getting of coal under any dwelling-house or dwelling-houses now or hereafter to be built on the said commons or waste lands within the perpendicular distance of forty yards from the same, Be it further enacted, that it shall be lawful for the person or persons who

shall or may be entitled to such dwelling-house or dwelling-houses, by
*647] *themselves, their agents and servants, from time to time and at all times to enter and go down into such mines of coal and ironstone which shall or may from time to time be opened, and to make use of the machinery belonging thereto for that purpose, and thereto"

P. 59. "view, search, measure, latch, and use all other means for discovering the perpendicular distance of the said dwelling-house or dwelling-houses from such mines as shall or may be from time to time at work, got, or getting, so that the perpendicular distance of the nearest approach of such mines of coal and ironstone to the said respective buildings may be thereby fully ascertained and determined; and in case it shall happen that such mine or mines have been or shall be worked or got within the perpendicular distance of forty yards as aforesaid, from the said respective buildings, whereby the same shall or may be endangered, it shall be lawful for the person or persons entitled as aforesaid, their heirs and assigns, and for their agents, servants, and workmen, at the expense, costs, and charges of the lord of the said manor for the time being, to enter into or upon such mine or mines, and from time to time to use all necessary and"

P. 60. "reasonable ways or means for repairing, supporting, sustaining, securing, and making safe the said respective buildings, and such expenses, costs, and charges shall be recovered by the person or persons entitled as aforesaid, of and from the lord of the said manor for the time being, together with all damages they or either of them shall or may sustain for or by reason of such mines being worked and got within the distance aforesaid."

The Act then empowered Commissioners to divide and allot the commons and waste lands.

*648] *The plaintiffs were entitled to the reversion claimed, by title derived from the original allottee of the surface under the Act. The defendant was the manager of the mines for parties deriving title from Mr. Jervoice, the lord of the manor at the time of the passing of the Act. He had worked the mines under the houses which were damaged; but not within the forty yards of any dwelling-house. The jury found, by the consent of the counsel for the plaintiffs, that the mining works had been performed with at least ordinary care: but they found that the damage had been occasioned by the working, and that, even without the weight of the houses, the ground would have given way by reason of the working. The counsel for the defendant contended that the lord of the manor either retained, after the enclosure, the same right of mining which he had possessed while the whole soil, above and below, belonged to him, or that the Act reserved to him the power of working the mines, except within the specified distance from dwelling-houses, provided this were done with ordinary care. A verdict was found for the plaintiffs, leave being reserved to move for a nonsuit.

In last Term, Sir *Fitzroy Kelly* obtained a rule calling on the plaintiffs to show cause why a nonsuit should not be entered, or a new trial be had: "First, on the ground that the action is not maintainable, there being no negligence or improper working proved; Second, that the working of the mines of the defendant is authorized by the Act of Parliament (Enclosure Act); Third, that, if compensation be payable under the Act of Parliament, it cannot be recovered in this action."

Alexander, *Whitmore*, and *Phipson*, now showed cause.—*The owner of mines is bound, in working them, to take only so much as will leave a reasonable support to the surface; Harris *v.* Ryding, 5 M. & W. 60;† that is, a sufficient support for the surface in its natural state; Humphries *v.* Brogden, 12 Q. B. 739 (E. C. L. R. vol. 64):(*a*) and the last case shows that, if enough be not left to support the surface in fact, no defence arises from the circumstance that the mines had been worked carefully and according to custom. Smart *v.* Morton, 5 E. & B. 30 (E. C. L. R. vol. 85), is another authority to the same effect: there reliance was placed on a deed which, it was said, enlarged the right of the mine owner and abridged that of the owner of the surface: but it was held that the deed did not go so far as to amount to a renunciation, by the latter, of his right to support. The defendant here relies upon the Enclosure Act. But that, in the first instance (p. 56), only gives the lord the right to get the coal and iron, and take earth to make bricks, making compensation to the allottees of the surface for damage done in so doing: this relates to surface damage only, and not to a subtraction of support; the working must be lawfully done, which is not the case where the support is destroyed; Harris *v.* Ryding. Then (p. 57) the lord is prohibited from mining within forty perpendicular yards of any dwelling-house; and (p. 58) power of inspection is given for the purpose of enabling the owners of dwelling-houses to ascertain whether this prohibition has been infringed, and, in such case, of repairing and supporting, the expense to be recovered from the owner of the mine. This does not derogate from the common law rights of the owner of the surface; it adds to them. At *common law the owner of the mine might have gotten the coal at any depth, great or small, provided he did not destroy the support of the surface; by this clause, he is absolutely prohibited from mining at a depth not exceeding forty yards: as to greater depths, the mutual rights are as they would have been independently of the clause. [*649] [*650]

Sir *Fitzroy Kelly*, *Whateley*, *Keating*, and *Somerset*, contrà.—The plaintiffs appear to insist that, whenever mining takes place below and damage above, the mine owner is to be answerable. [Lord CAMPBELL, C. J.—The jury are to say whether the one causes the other.] It appears that here the parties who concurred in framing the Act, considering that they could not safely rely upon the view to be taken by juries, fixed

(*a*) See p. 751.

beforehand the limits within which the working should not take place, and, by consequence, left it free to the mine owner to work without those limits. When the Act passed, the lord was owner of the whole land, surface and mine, and could work without limit, unless indeed he derogated from the enjoyment of the common by the commoners. His right is not created by the clause at p. 56, but assumed. The lord had the right to get the minerals; this clause enables him to use the surface for that purpose. The clause at p. 57 constitutes, in effect, the contract: he gives up nothing but the right of mining at so small a depth as forty yards. There is no more natural right in the owner of the surface than in the owner of the mine. It is true that the lord, if he conveyed a dwelling-house, might be supposed to undertake not to impeach his grant by injuring the house. But nothing appears here
*651] which suggests that *he has parted with any of the rights which he originally had, except to the extent specified: he cannot have meant to give to the owner of the surface the power to erect a dwelling-house invested with privileges abridging the pre-existing right of mining. It is to be observed that Lord Campbell, at the close of the judgment in Humphries *v.* Brogden, 12 Q. B. 757 (E. C. L. R. vol. 64),(*a*) said: "We need hardly say that we do not mean to lay down any rule applicable to a case where the primâ facie rights and liabilities of the owner of the surface of the land and of the adjacent strata are varied by the production of title deeds, or by other evidence." So in Smart *v.* Morton, 5 E. & B. 46 (E. C. L. R. vol. 85), Lord Campbell said: "the primâ facie rights and obligations of the owner of the surface and of the minerals may be varied by the production of title deeds, or by other evidence." Now here the title, antecedent to the Act, is shown: there is no right whatever in the plaintiffs except such as they derive from the Act; nor is there any abridgment of the right of the original owner of the whole land except such as the Act creates. The case is much like Dudley Canal Navigation Company *v.* Grazebrook, 1 B. & Ad. 59 (E. C. L. R. vol. 20). There, by a canal Act, the mine owner was not to work under or within twelve yards of the canal, except upon giving notice to the canal company, who then might purchase the minerals: and he was not, in working, to do injury to the navigation. The mine owner gave the notice; the company did not purchase of the mine owner. Then he worked within the distance, and injured the navigation; but he had worked only in the usual and ordinary mode: and the Court held that he was not liable: and they
*652] said that *the clause as to not injuring the navigation was "to be construed with some qualification, viz. either that the party working the mines is to do no unnecessary damage or injury to the navigation, or no extraordinary damage or injury by working them out of the ordinary and usual mode." In the course of the argument,

(*a*) See Rowbotham *v.* Wilson, ante, p. 593.

Littledale, J., said: "Suppose there had been no Act of Parliament in this case, and a man had sold the land to the company, reserving all mines to himself, he surely would have been entitled to work the mines in the usual way, even if he had thereby caused damage to the company." Wyrley Canal Company *v.* Bradley, 7 East, 368, is a similar case. As to the compensation, it is given only for surface damage: and, besides, this action is not brought for not compensating.

Lord CAMPBELL, C. J.—I am of opinion that this rule must be discharged. Under the Enclosure Act, after the allotment has been made, the allottee of the surface, though the minerals are reserved, has all that the owner of the surface has when the surface and the minerals are under distinct ownerships. It lies on the defendant, who has the minerals, to show that under the Act some right is conferred upon him which the common law did not give. Before the Enclosure Act, the land down to the centre of the earth belonged to the lord: he agrees to the Act; and, by that, he places the allottees of the surface of the enclosed waste in the same position as if it had been ancient enclosed land and the lord had alienated the surface reserving the minerals. In such a case the owner of the surface would in general have *a right to the support of the strata below; and it would lie on the [*653 mine-owner to show a special right derogating from this. That being so, according to Humphries *v.* Brogden, 12 Q. B. 739 (E. C. L. R. vol. 64), a decision which binds us till it is corrected by a Court of Error, the owner of the surface has a right to support from the subjacent strata: and, if the owner of those strata, working ever so carefully and conformably to the customary mode, causes the surface to subside, he is liable to an action at the suit of the owner of the surface. Then what are the special powers conferred by the Enclosure Act? According to one reading of the clause at page 56, a right is reserved to the lord to get minerals anywhere, and at any depth, provided he makes compensation for the damage done. But that interpretation of the clause is abandoned by common consent: and it seems to be agreed that the clause is confined to surface damage, and gives a right only to do that for which the compensation could be made. By this section, therefore, no right to take away the support of the surface is conferred; and therefore no defence is afforded. Then we are to consider the clause at page 57. That is restrictive: the lord is positively forbidden to work at all on the surface within the distance of forty yards of any dwelling-house, or to get any coal or ironstone under any dwelling-house within forty perpendicular yards from the foundation: if he does so, he is a wrong-doer, even if no injury results; and a Court of Equity would restrain him by injunction from doing so. Then there is a power to inspect; but that is only for the purpose of enabling the owner of a dwelling-house to see that no *minerals had been gotten within the depth [*654 of forty yards. Therefore nothing beyond what is said in the

clause at page 56 confers any power upon the lord to do anything which he might not do at common law, anything which the owner of minerals might not do in general. Here the mining has caused the land to subside: and the owner of the surface has the right to the foundations which he asserts, and which the second plea denies. That right has been violated: and it is immaterial whether this has been caused by a mining at the depth of fifty or five hundred yards, if the injury has been done.

COLERIDGE, J.—I am of the same opinion. Independently of the particular clauses, the ordinary result of any enclosure giving the surface to one owner and the sub-soil to another makes them owners of each, respectively, with their common law rights. For the present we must hold, as this Court has decided, that the owner of the surface has a right to the support of the subjacent strata. But then the clauses of the Enclosure Act are referred to. Both sides agree that the clause at page 56 does not bear on the present question, that it only gives the owner of the mine a right to enter on the surface, making compensation for damage. I agree that the clause at page 57 contains an absolute prohibition, and is not applicable, the act complained of not being within the prohibition. The next clause has in view only acts falling within the clause last mentioned.

ERLE, J.—I am of the same opinion. As to the ground mainly relied upon on both sides, the Act of *Parliament recognises a separate property in the owner of the surface and the owner of the minerals. If the owner of minerals may not so work as to destroy the support of the surface, is there anything in the Act interfering in this case with the rule of common law? I thought, at first, that the section conferring the right to enter and get all the minerals, subject to the duty of making compensation, was applicable: but it seems to be agreed that that only gives a power to enter on the surface. Then we are to look at the next section. It is said that this recognises a power in the lord as great as that which he had when he was owner of both surface and sub-soil, subject to the restriction not to work on the surface within forty yards of any dwelling-house, or to get the minerals within the perpendicular depth of forty yards from the foundation of the dwelling-house. I cannot see that any such right is recognised: the surface is given to the allottees, and a peculiar protection to the owner of the dwelling-house: but his general right to support is left.

*655]

(CROMPTON, J., had left the Court.) Rule discharged.

*FENN and MARSDEN *v.* GREEN. *June* 2. [*656

Notice of trial, delivered and dated on a day in Easter Term, 1856, was (owing to an amendment in the pleadings after issue and notice had been prepared, and an incomplete alteration of the notice in consequence) given for the second sittings in Easter Term "next;" and the case was tried and a verdict obtained against the defendant, in his absence, at the second sittings in Easter Term, 1856. The Court, believing that in fact the defendant had not been misled, refused to set aside the verdict, though the defendant swore that he was misled, and also to merits.

H. HAWKINS, in this Term, obtained a rule calling upon the plaintiffs to show cause why the verdict obtained in this cause, and all subsequent proceedings, should not be set aside with costs: "on the ground that no sufficient notice of trial was given: or why there should not be a new trial: on the ground that the defendant was misled by the notice of trial, and did not appear at the trial, under the belief that it was for the second sittings in Easter Term, 1857; and also upon the ground that the defendant has filed an affidavit of merits: and also upon the ground that he had no sufficient notice of trial."

The rule was obtained on the affidavit of the defendant. He deposed that he had pleaded to the action on 31st March, 1856, and that issue was joined on 18th April, 1856. That on that day notice of trial was given for "the second sittings in next Easter Term." That, on receiving the notice, he "believed that the notice was given for Easter Term, 1857, and took no notice thereof." That, having occasion to go to Yarmouth and Norwich on business, he was surprised to find, on his return on 8th May, 1856, that the plaintiffs had proceeded to trial and obtained a verdict, and had given him notice, on 5th May then instant, for the taxation of costs. That he had, as he was informed and verily believed, a good defence upon the merits.

*In answer, the attorney for the plaintiffs deposed that on 31st March last defendant delivered a plea which was informal and demurrable; whereupon the said attorney took out a summons for leave to sign judgment: and that, on 18th April, the plea was amended by a Judge's order, by consent; and, on the same day, issue and notice of trial were delivered as stated in defendant's affidavit. The attorney further deposed that "I had prepared the said issue, ready to be delivered on the 2d day of April last, for the first sittings in last Easter Term, and had so dated it; but, owing to said last-mentioned plea being defective, I could not deliver it on that day: and, when the plea was amended, I altered the date of the notice of trial from the 2d to the 18th of April, and the sittings from the first to the second sittings, as on inspection of the said issue will appear." That defendant well knew that the notice of trial was for Easter Term 1856; for that, two or three days after the delivery thereof, deponent, in a conversation with defendant (more fully detailed), told him that the case would be [*657

tried in about ten days. This conversation was also deposed to by the partner of the last deponent.

O'Malley now showed cause.—It is impossible to believe that the defendant was misled by the mistake in the notice. The question, therefore, is whether he is entitled to avail himself of the verbal inaccuracy. Benthall *v.* West, 1 D. & L. 599, was cited when the rule was moved for; and that decision is certainly an authority for the defendant. But Lord Abinger there differed from the rest of the Court: and the justice of the case is clearly the other way.

*658] *H. Hawkins*, contrà.—A notice of trial must be in writing, by Reg. Gen. H. 1853, sect. 161,(*a*) and must clearly and specifically show when and where the trial is to be had; else the trial is irregular. [COLERIDGE, J.—Though the defendant knows what is really meant?] Yes. The notice, as it originally stood, was good for Easter Term 1856, being dated before that Term commenced: when the date was altered to a day in that Term, the word "next" could not mean the then Term. Benthall *v.* West is an instance of the strictness with which such notices are construed; and that case was much stronger than this, inasmuch as there the defendant's attorney had agreed to short notice of trial for the Term which was really meant, and had been in Court the day before the trial. And there the defendant did not, as here, depose to his having been misled. Then there is the affidavit of merits.

Lord CAMPBELL, C. J.—I am of opinion that this rule ought to be made absolute. It is very proper that there should be a written notice of trial, giving information upon which a reasonable man would act. We may here treat the word "next" as surplusage; and then the Term described in the notice will be that in which the notice is given.

COLERIDGE, J.—I entirely agree. The notice in writing is for the purpose of giving information when the cause is to be tried. As to the defendant's affidavit that he believed Easter Term 1857 to be meant, I not only do not believe it, but think it one of the most impudent affidavits ever filed.

*659] *ERLE, J.—He must have known that Easter Term 1856 was meant, when he found the words repeated which had been used to designate that Term.

CROMPTON, J.—No doubt the notice conveyed to the mind of the defendant that that Term was meant. I agree with the view taken by Lord Abinger in Benthall *v.* West, 1 D. & L. 599; and I think we ought to say that we do not assent to that decision. As it was a decision that could not be reviewed in a Court of Error, we are justified in saying that it is one which this Court, dissenting from it, will not act upon.

Rule discharged.

(*a*) 1 E. & B. xxvi., 72.

ROBERT HANKS, JAMES COLE, WILLIAM HANKS, and ROBERT WILLIAMS, *v.* HENRY PALLING. *June* 2.

Defendant became purchaser at public auction of a lot comprehending a freehold messuage and a fee farm rent of 21*s*. By the conditions of sale, no evidence was to be required of the receipt or payment or existence of the fee farm rent, other than that disclosed by a certain conveyance; "nor should any objection be taken to the title in consequence of the non-payment or non-receipt" of the fee farm rent. It was discovered that in fact the rent had not been paid or received for twenty years before the sale: and the purchaser contended that it was therefore extinguished under stat. 3 & 4 W. 4, c. 27, s. 34, and had ceased to exist at the time of the sale.

Held, that he was not entitled to repudiate the contract on this ground, but must be considered to have purchased, under the conditions of sale, the chance of the rent being obtainable.

THE declaration charged that plaintiffs heretofore, to wit, on 22d January, 1855, caused to be put up and exposed to sale, by public auction, in divers lots, certain premises, including amongst others a freehold messuage or tenement, &c., subject to an apportioned yearly fee *farm rent of 21*s*., but with the benefit of a fee farm rent of 21*s*. granted out of premises in New Street, Bristol, which comprised [*660 lot 3 in the particulars of sale, upon and subject to the following (amongst other) conditions of sale. That the highest bidder for each lot should be the purchaser thereof. That the purchaser, or respective purchasers, should, immediately on being declared such, pay to the vendor's solicitor a deposit of 15*l*. per cent. on the amount, and in part of the purchase-money, and sign an agreement for payment of the remainder on 25th March then next, between the hours of, &c., at, &c.; at which time and place the respective purchases were to be completed, and from which time the respective purchasers would be entitled to the possession or to the receipt of the rents and profits of the property purchased. And, if from any cause whatever the purchase or respective purchases should not be completed by the said 25th day of March, the purchaser or purchasers making default should pay interest at the rate of 5*l*. per cent. per annum on the remainder of his, her, or their purchase-money from that day until the purchase or respective purchases should be completed. That, within fourteen days from the day of sale, the vendors should, at their expense, have ready at, &c., for delivery to each purchaser, an abstract of title to the lot or lots purchased by him, her or them respectively; commencing, as to lot 1, with, &c.; as to lot 2, with, &c.; as to lot 3, with indentures of lease and release of 24th and 25th June, 1816: but should not be required to deduce any title prior to the aforesaid dates, nor to produce any deeds or documents not in their possession, whether recited, mentioned, or referred to, or covenanted to be produced in or by any indenture *or not. And, if the respective purchasers or their respective [*661 solicitors did not, within ten days from the time of the abstracts being ready for delivery as aforesaid, state to Thomas Dix (before mentioned) some valid objection or requisition in writing to or on the title

or respective titles commencing as aforesaid, he, she, or they should be considered as accepting the same; and all objections and requisitions not delivered by that time should be considered as waived; and in this respect time should be considered as of the essence of the contract. That all statements or recitals in any deeds or documents twenty years old or upwards should be deemed conclusive evidence of the matters, facts, or deeds as stated. And the purchaser of any lot should not be entitled to require any other evidence of the division or proportion of any ground-rent, payable out of any lot with other premises, other than that in the vendors' possession; and no evidence should be required of the receipt or payment or existence of the two ground-rents of 1*l.* 1*s.* each, other than that disclosed by the conveyance to Robert Hanks, deceased, which was then produced; nor should any objection be taken to the title in consequence of the non-payment or non-receipt of either of the said rents. That, upon payment of the remainder of the purchase-money at the time and place before mentioned, and the full observance and performance of those conditions on the part of the respective purchasers, the vendors should convey the respective lots to the respective purchasers thereof, or as he, she, or they should direct: but vendors, being trustees for such sale, should not be required to enter into any other covenant than the usual covenant that they had done no act to encumber. That, if any *error or misstatement should be discovered in the aforegoing particulars of sale as to any lot or lots, the same should not annul the sale; but a compensation or equivalent in respect of such lot or lots should be given or taken as the case might require; such compensation, in case of difference, to be settled by the auctioneer, and to be binding on all parties. That, if any purchaser or purchasers should fail to comply with the said conditions, his, her, or their deposit money shall be forfeited to the vendors, who should be at liberty, at any time, to resell the lot or lots purchased by such defaulter or defaulters, either by public auction or private contract; and the deficiency, if any, occasioned by such second sale, and all expenses attending the same, should, immediately after the resale, be made good to the vendors by the defaulter or defaulters at that sale; and, in case of non-payment of the same, the whole thereof should be recoverable by the vendors as and for liquidated damages without previously tendering a conveyance to the purchaser or purchasers making default: and any increase in price which might be produced on any subsequent sale should belong to the vendors. That, if the vendors should be unable to make a good title to any or either of the lots agreeably to the said conditions, or if the purchaser or purchasers, or his, her, or their solicitors, should make any requisition on the title with which the vendors should be unwilling or unable to comply, and notwithstanding such vendors might have previously endeavoured to answer or comply with such requisitions, the deposit money and fees then paid

*662]

relating to such lot or lots should be returned to the purchasers, who should accept the same in full satisfaction of all damages, and the contract be no *further proceeded with. (The declaration set out numerous other conditions, which, as not material to the point decided, have been omitted.) [*663 Averment: that defendant was the highest bidder for, and then became and was in due manner declared to be the purchaser of, the said messuage or tenement, &c., subject as aforesaid, being lot 3 as aforesaid, and then agreed to purchase the same at and for a certain sum of money, to wit, 105*l.*, under and subject to the said conditions of sale, and did then pay down a certain sum of money, to wit, the sum of 15*l.* 15*s.*, being after the rate of 15*l.* per cent., as a deposit upon and in part payment of the said purchase-money. And, although plaintiffs were ready and willing to do and perform, and did and performed, all conditions precedent and other things on their part to be done and performed, pursuant to the said conditions, and although the said 25th of March, being the time for payment of the remainder of the said purchase-money, pursuant to the said conditions, had elapsed before the resale hereinafter mentioned, yet defendant did not nor would, on or before the said 25th March, or at any other time, pay or cause to be paid to plaintiff the remainder of the said purchase-money or any part thereof, pursuant to his said conditions and agreement, but then wholly neglected and refused so to do, and failed to comply with the said conditions of sale as to the payment of the remainder of the said purchase-money. And thereupon plaintiffs, afterwards, and after the said 25th March, according to and by virtue of the said conditions of sale, again exposed the said messuage or tenement, &c., subject as aforesaid, to sale by public auction under and subject to certain terms and conditions of sale; and the same were then, at such last-mentioned exposure to *sale as aforesaid, resold for [*664 a much less price or sum of money than the said price or sum for which the same had been sold to defendant as aforesaid, to wit, for the sum of 81*l.*; whereby there was a deficiency between the said price for which the said messuage or tenement, &c., subject as aforesaid, were so sold to defendant as aforesaid, and the said price for which the same were so sold on such resale, to a large amount, to wit, 24*l.*; and the expenses attending such resale then amounted to a certain other large sum of money, to wit, 8*l.* 19*s.* 6*d.*; of all which said premises the defendant had due notice; and, by reason of the premises, and according to the said terms and conditions of sale, defendant then became liable to pay, and ought to have paid, to plaintiff the several sums of 24*l.*, and 8*l.* 19*s.* 6*d.* Breach: non-payment of those sums.

The defendant pleaded several pleas: the following only are now material:—

4. That plaintiffs did not, within fourteen days from the day of the said sale, have ready at, &c. (the place named in the conditions), for

delivery to the defendant, an abstract of title to the said lot so purchased by the defendant as aforesaid, commencing as in the said conditions in that behalf mentioned, and in other respects according to the said conditions.

5. That defendant did, within ten days from the time of the abstract of title to the said lot so purchased by him being ready according to the said conditions, state and deliver to the said Thomas Dix divers valid objections in writing to the title to the said lot so purchased by the defendant, commencing as aforesaid; and which objections, by the said conditions and the said agreement of purchase, the defendant was
*665] entitled *to take and make; and which objections then existed and still exist; and the same were not at any time cleared up or removed.

6. That defendant did, within ten days from the time of the abstract of title to the said lot so purchased by him being ready, according to the said conditions, state and deliver to the said Thomas Dix divers valid requisitions in writing on the title to the said lot so purchased by the defendant, commencing as aforesaid; and which requisitions, by the said conditions and the said agreement of purchase, the defendant was entitled to make and insist on: and the plaintiffs did not comply with, clear up, or answer the said requisitions: and they did not make out or deduce a good and valid title to the said lot, according to the said conditions.

8. That the said alleged fee farm rent of 21*s.* alleged and described to have been granted out of premises in New Street, Bristol, had no existence whatever at the time of the said exposure to sale, or at any time since; and there was no such property or thing.

Issues were taken on all the pleas.

On the trial, before Cresswell, J., at the last Gloucestershire Assizes, it appeared that the sale took place as stated in the declaration, and that the particulars and conditions of sale were as there stated, except that, instead of the words in the declaration "but with the benefit of a fee farm rent," &c., the words in the particulars were "and also a fee farm rent," &c. It was admitted by the counsel for the plaintiffs that neither of the fee farm rents had been paid or received for more than twenty years. The defendant's attorney, after the abstract was
*666] delivered to him, sent in to the attorney *for the plaintiffs, within the ten days, some written requisitions, the first of which was as follows.

1. "The vendor should show his title to the rent of 1*l.* 1*s.* issuing out of messuages in New Street, which is not disclosed by the abstract." To which the attorney for the plaintiffs returned an answer in writing referring to the condition of sale, and adding: "Mr. Cole, one of the trustees, and who appears to have been well acquainted with Mr. Hanks and his affairs, understands that the rent of 1*l.* 1*s.*, charged on premises

in New Street, was never received by him." The defendant insisted on the objection, and refused to complete the purchase: and the resale took place at the loss described in the declaration. A verdict was taken for the plaintiffs for 32*l.* 19*s.* 6*d.*, leave being reserved to move to enter a verdict for the defendant.

Whateley, in last Term, obtained a rule Nisi for entering a verdict for the defendant, "on the ground that, the fee farm rent payable out of the premises in New Street having been extinguished by non-payment, the defendant, notwithstanding the conditions of sale, was entitled to rescind the contract in toto."

Keating now showed cause.(*a*)—The defendant was not entitled to refuse to complete the purchases. A purchaser, in general, may of course require a good title; but he may limit this general right; Spratt *v.* Jeffrey, 10 B. & C. 249 (E. C. L. R. vol. 21), is a strong instance. But it is said that, although the defendant might have been precluded from objecting to *the title to an existing property, yet, under stat. 3 & 4 W. 4, c. 27, s. 34, the rent is actually extinguished [*667 by non-payment, so that this is a sale, not of something to which the plaintiff cannot show a good title, but of that which does not exist. The conditions, however, drew the attention of the purchaser to the particular difficulty of the non-payment; and he was content to take the risk. It is not like the case of the sale of a ship or other chattel, where the existence of the thing sold is assumed as a condition of the contract. [COLERIDGE, J.—Perhaps it will be said that, though the purchaser was not to object to want of proof of payment, he might, if he himself proved non-payment, insist upon the non-existence of the rent.] He has agreed not to repudiate the bargain in consequence of the non-payment itself. It is as if he had said: I am aware that the rent has not been paid for twenty years; but I will take the lot nevertheless: in that case, could he have refused to take the lot on the ground of the non-payment? It may be that, if the rent had never existed, or had been aliened, the condition would not protect the vendors; but the specific objection made is provided against by the condition.

Whateley and *Phipson*, on a later day in the Term (June 4th), were heard in support of the rule.—It appeared, on the evidence, that the rent, by sect. 34 of stat. 3 & 4 W. 4, c. 27, had no existence. In Robinson *v.* Musgrove, 2 Moo. & R. 92, the conditions of sale provided: "That if any mistake shall be made in the description of the premises, or any other error whatever shall appear *in the particulars of [*668 the property, such mistake or error shall not annul the sale, but a compensation or equivalent shall be given or taken, as the case may require." A substantial part of the property, as described in the particulars of sale, could not be found at all: and Tindal, C. J., said to

(*a*) Before Lord Campbell, C. J., Coleridge and Erle, Js.

the jury: "If any substantial part of the property purporting to be sold turns out to have no existence, or cannot anywhere be found, that circumstance, in my opinion, entitled the plaintiffs to rescind the contract in toto; even if you think that the defendant was not guilty of any fraudulent misrepresentation in that respect: deficiency in the value may be fit matter for compensation; but not the total absence of one of the things sold." That case also shows that the clause for compensation, in the present case, is inapplicable to the facts. In Dobell *v.* Hutchinson, 3 A. & E. 355 (E. C. L. R. vol. 30), the same points were decided by this Court in banc. A condition which should dispense with the existence of the subject of sale described in the particulars would be repugnant and void. [COLERIDGE, J.—Is the rent itself extinguished? Does sect. 34 do more than extinguish the right to sue for it? If, after non-payment for twenty years, a series of fresh payments were made, might not the old rent be said to exist without a fresh grant? Lord CAMPBELL, C. J.—If you could show that the rent had in fact never existed, your argument might be sound.] According to Owen *v.* De Beauvoir, 16 M. & W. 547,† the non-payment for twenty years extinguishes the rent itself; so that it is not necessary to plead the statute in answer to an avowry for the rent, but proof of the non-payment supports a plea of non tenuit.

*669] *Lord CAMPBELL, C. J.—I think the plaintiffs are entitled to our judgment. The purchaser makes an objection which is excluded by the conditions of sale. The defendant's counsel appear properly to admit that the condition applies, if it be valid: and he would be entitled to object if the fact were that there had never been such a rent, or that it had been aliened. But he cannot object that there has not been a payment; and this is all that he attempts to do. It is ingeniously argued that the rent, under those circumstances, was a nonenity, and could not be made the subject of sale. But, at the time of the sale, it seems to have been doubtful whether there had been a perception of the rent within the twenty years. There is nothing illegal in selling a chance of getting the rent; and the conditions show that this is what was done. We are not called upon to give any opinion upon the point whether, after the expiration of the twenty years, there was an absolute bar. My decision rests upon the ground that by this agreement the purchaser took the risk of the rent not having been paid; and in that there is nothing illegal.

COLERIDGE, J.—I am of the same opinion. The language of the conditions has been studiously framed so as to preclude this objection. It is not said that there shall be no objection taken on the ground of the non-existence of the rent, but that no objection shall be taken on the ground of non-payment or non-receipt. It is argued that, by reason of the non-payment, the rent was not in existence at the time of the sale. But it seems that it once was in existence, and that the only

doubt was whether or not there had been payment *which could be proved. An agreement to purchase a rent under such circumstances is perfectly valid. [*670

ERLE, J., concurred.

(CROMPTON, J., had left the Court.) Rule discharged.

SIEVEKING and SIEVEKING *v.* MAASS. [*April* 30, 1856.]

Declaration alleged that defendant, being master of a ship lying at Copenhagen, agreed with plaintiffs, by charter-party between them, that the ship should proceed to Nyland, and there load from plaintiffs' factors a cargo of timber, and proceed therewith to a coal port, or a good and safe port in the Firth of Forth, or to London, or to a good and safe port on the East coast of Great Britain, as ordered, on signing bills of lading, or at Elsinore downwards (to wit, homewards), and deliver her cargo on being paid freight: that the ship did proceed to Nyland, and there load, and defendant signed a bill of lading for the cargo, in which it was stated (as the fact was) that the ship was bound for orders at Elsinore: that the ship arrived at Elsinore downwards: Yet defendant would not communicate with plaintiffs (to wit, in London) as he could have done, or wait a reasonable time at Elsinore downwards for orders; but, before a reasonable time had elapsed for plaintiffs to give or send orders to Elsinore, defendant took the ship with the cargo, without orders and against the will of plaintiffs, to Leith, a port in the Firth of Forth, where plaintiffs did not require the cargo to be, by which plaintiffs were put to expense in bringing the cargo from Leith to London.

Pleas: 1, as to defendant not communicating with plaintiffs, that defendant was not bound so to communicate: 2, as to the residue of declaration, that defendant waited a reasonable time at Elsinore downward for orders, but no orders were given or sent by plaintiffs to Elsinore within a reasonable time; wherefore defendant, after the lapse of a reasonable time for the receipt of orders, proceeded with the ship and cargo to Leith, being a good and safe port in the Firth of Forth, without any notice or knowledge that plaintiffs did not wish the ship and cargo to proceed there or did not require the cargo there.

On demurrer:

Held, that plaintiffs were not entitled to recover, defendant not being bound to communicate, and being justified, in the absence of orders, in taking the cargo to a place named in the charter-party.

By the Exchequer Chamber, affirming the judgment of Q. B.

THE declaration alleged that the plaintiffs and the defendant agreed by charter-party that the ship Minerva, of which defendant was master, then lying at Copenhagen, should proceed to Nyland direct, and there load from the plaintiffs' factors a cargo of timber, and, being so loaded, should therewith proceed to a coal *port, or a good and safe port in the Firth of Forth, or to London, or to a good and safe port [*671 on the East coast of Great Britain, as ordered on signing bills of lading, or with Landwall & Fock, at Elsinore downwards, to wit, homewards, and deliver her cargo on being paid freight as in the said charter-party mentioned; to wit, for deals, &c. (specifying freights of different kinds of timber), if to the Firth of Forth, or a coal port; and (additional rates) if ordered to London or East coast (other terms as to freight); all with 5 per cent. primage thereon. That the ship did proceed to Nyland direct, and did there load the agreed cargo; and that the defendant then signed a bill of lading for the said cargo, in which it

was stated (as the fact was) that the ship was bound for orders at Elsinore. That the said ship, so loaded, proceeded to and arrived at Elsinore downwards. That the defendant did not and would not communicate with the plaintiffs, to wit, in London, as he could and might and ought to have done, or wait a reasonable time at Elsinore downwards for orders as agreed, but, without communicating with the plaintiffs, and before a reasonable time had elapsed for the plaintiffs to give or send such orders to Elsinore, to wit, to Landwall & Fock, the defendant proceeded with and took the ship, with the cargo, without orders, and against the will of the plaintiffs, to Leith, being a port in the Firth of Forth where the plaintiffs did not require the cargo: whereby, and by means of the premises, the plaintiffs were put to great and unnecessary expense, and were forced and compelled, in order to get the cargo carried to London, where they required it to be delivered, to charter a ship to bring the cargo from Leith to London for freight and reward in that behalf.

*672] *Plea. 1. As to so much of the declaration as charges the defendant with not communicating with the plaintiffs in London: that defendant ought not and was not bound so to communicate.

2. As to the residue of the declaration: that defendant did wait a reasonable time at Elsinore downwards for orders; but that no orders were given or sent by the plaintiff to Elsinore within a reasonable time in that behalf. Wherefore the defendant, after the lapse of a reasonable time for the receipt at Elsinore of any orders that might have been given or sent by the plaintiffs, proceeded with the said ship and cargo to Leith, being a good and safe port in the Firth of Forth, without any notice or knowledge that the plaintiffs did not wish the said ship and cargo to proceed there, or that the plaintiffs did not require the said cargo at Leith.

Demurrer to both pleas. Joinder.

Manisty, for the plaintiffs.—Taking it that the plaintiffs, by neglect, did not send their orders to Elsinore in a reasonable time, the defendant was not entitled to carry the cargo to Leith without orders. He might, as appears by the pleadings, have communicated with the plaintiffs: if he suffered any injury for want of orders, he might have sued the plaintiffs. But he had no right to assume the discretion of determining the destination of the cargo. [CROMPTON, J.—By going to Leith, he went where he was most likely to find orders.] He might have left the cargo at Elsinore: the risk would then have fallen on the plaintiffs. The defendant does not allege that Leith was the place in which he was most likely to obtain orders, nor that he gave any notice

*673] to the plaintiffs. [CROMPTON, J.—Your complaint seems *to be that he did not wait an unreasonable time.] The complaint is that he took the cargo to a place to which he had no authority to take it. It was at least reasonable that he should first communicate with the

plaintiffs. [Lord CAMPBELL, C. J.—It seems to me most unreasonable to require it.]

Honyman, contrà, was not called upon.

Lord CAMPBELL, C. J.—The defendant is clearly entitled to our judgment. The plaintiffs undertake to send orders to Elsinore, and neglect to do so. What was the defendant, as a reasonable and honest man, to do after he had waited for orders a reasonable time? He was to go to the place where he thought it would be most to the advantage of the plaintiffs that he should be. If, indeed, there were anything in the charter-party requiring him to send off a message by the electric telegraph, and he had failed to do so, there might be ground of complaint. But no such obligation existed.

(WIGHTMAN, J., had left the court.)

ERLE, J.—I see no good ground for making the defendant liable.

CROMPTON, J.—The only communication possible might be by a slow ship. It might be best for all parties that the defendant should do as he has done. Judgment for defendant.

---

*IN THE EXCHEQUER CHAMBER. [*674

June 3.

THE plaintiffs alleged error in the above judgment; which the defendant denied. The case was now argued.

Manisty, for the party assigning error (plaintiffs below).—The defendant must contend that, not having received orders from the shippers, though he might have communicated with them, he was entitled to take the cargo to any port which he chose to select. He was not so entitled, whether the port was or was not mentioned in the charter-party. [CRESSWELL, J.—Suppose the shippers had written to him, saying expressly that they would give him no orders.] He might then have left the cargo wherever he was. [JERVIS, C. J.—But was he bound to do so?] The question is, whether he had a right to take the cargo wherever he chose: if he did not communicate with the owner, he could at any rate acquire no such authority. The first plea is clearly bad, as averring a mere conclusion of law. [MARTIN, B.—Does the declaration show a breach?] The power of the master to hypothecate rests ultimately on his means, or want of means, of communication with the owners. [CRESSWELL, J.—That is a part of maritime law arising upon the peculiar position of the parties. Here we have an express contract.]

Honyman, contrà, was not called upon.

*JERVIS, C. J.—The case is clear on the face of the charter-party. The owner of the cargo had the power to select a par- [*675

ticular port: but, in the absence of such selection, the defendant was clearly justified in going to any other port named in the charter-party.

POLLOCK, C. B., CRESSWELL, J., WILLIAMS, J., MARTIN, B., WILLES, J., and BRAMWELL, B., concurred. Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

BARKER, Appellant, *v.* WINDLE and Another, Respondents. *June* 3.

To an action for not loading a ship according to the terms of a charter-party, in which plaintiff was described as "of the ship A., of the measurement of 180 to 200 tons, or thereabouts," defendant pleaded that by the said charter-party the ship was *warranted* to be of the measurement of 180 tons to 200 tons, or thereabouts; and that the said ship was of a measurement greatly and unreasonably exceeding 200 tons, and was not of the measurement of 180 tons to 200 tons or thereabouts; whereupon defendant did not load.

Held, that the plea was not proved, inasmuch as the statement of tonnage in the charter-party was matter of description only, and did not amount to a warranty.

Where the Court of Exchequer Chamber, under sect. 41 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), confirms on appeal the decision of the Court below, as to granting, discharging, or making absolute a rule, the appellant is liable for the costs both of the appeal and of the proceedings below.

APPEAL by the defendant below, under sect. 34 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). The case was stated in substance as follows.

The declaration was on a charter-party between plaintiffs and defendant, upon a vessel called the Avance, by which defendant agreed to ship in her a complete cargo of coals. Breach, refusal of defendant to ship such cargo, or to pay the freight.

*676] *Plea 1: that the said ship was, in and by the said charter-party, warranted to be of the measurement of 180 tons to 200 tons, or thereabouts; and the defendant says that the said ship was of a measurement greatly and unreasonably exceeding 200 tons, and was not of the measurement of 180 tons to 200 tons, or thereabouts; wherefore defendant, before any breach by him of the said charter-party, and before anything was done by the plaintiffs or the defendant under the said charter-party, refused to load the said ship with a cargo of coals, or any part thereof, or in any way to perform the said charter-party, and gave the plaintiffs notice of such his refusal.

Plea 2. Fraud.

The plaintiffs took issue upon these pleas respectively.

On the trial before Lord Campbell, C. J., at the London Sittings after last Michaelmas Term, the facts appeared to be as follows.

The plaintiffs below were merchants in London, and agents of the owner of the ship in question. The defendant was a ship broker in Newcastle. While the ship was on her voyage home to Newcastle, the defendant applied, on behalf of one of his principals, to the plaintiffs' London brokers, to know if they had a ship which he could charter to proceed from Newcastle to Alexandria with coal, and to return with

grain. The plaintiffs' brokers, in reply, mentioned the ship in question, and stated that they were not quite sure of the size; that they believed it was a little larger than another ship of the same owner, which they knew to be of the burthen of 160 to 180 tons; and that they believed it was not of more than 200 tons. They further stated that they had made search in the register books in order to find the exact tonnage, but that the ship *was not mentioned there. Neither the plaintiffs nor their brokers nor the defendant knew the exact size of the ship. The defendant agreed to charter the ship; and a charter-party was executed by the plaintiffs and the defendant for her voyage to Alexandria. It was expressed to be between "Messrs. Windle & Co., of the good ship or vessel called the Avance, now on her way to Newcastle, of the measurement of 180 to 200 tons or thereabout, whereof is master," and defendant. It was agreed "that the said ship being tight," &c., should proceed to a safe port in the Tyne and there load from defendant a complete cargo. On the arrival of the ship at Newcastle the defendant measured her, and found her to be of $257\frac{81}{100}$ tons. He immediately refused to load the ship, giving as his reason her excess in size. [*677

A verdict was found for the plaintiffs, leave being reserved to move to enter a verdict for the defendant on the issue joined on the first plea, on the ground that the said ship was, by the charter-party, warranted to be of the measurement of 180 to 200 tons, or thereabouts, and that the ship greatly exceeded such measurement.

Knowles, in last Hilary Term, moved accordingly.(*a*) The Court refused to grant a rule. The present appeal was against this refusal.

Knowles, for the appellant.—The statement of measurement in the charter-party amounts to a warranty that the ship is of that tonnage. Hunter *v.* Fry, 2 B. & Ald. 421, will *be relied on by the other side. But there the ship was lying in port, and the freighter had an opportunity of ascertaining her size for himself. He adopted the ship, and partially loaded her; and it is clear that he could not afterwards repudiate his contract on account of a misdescription of her size in the charter-party. In the present case, as in almost all contracts for freight, the tonnage of the ship is of the essence of the contract, and therefore, according to the rule laid down in Glaholm *v.* Hays, 2 M. & G. 257 (E. C. L. R. vol. 40), and Ollive *v.* Booker, 1 Exch. 416,† the statement of the tonnage is not a mere representation, but a warranty, and the fulfilment of it is a condition precedent. But, even if the statement were merely a misdescription, it is a misdescription of a material point, and therefore makes the contract void. In Flight *v.* Booth, 1 New Ca. 370, 377 (E. C. L. R. vol. 27), Tindal, C. J., in [*678

(*a*) January 14th, before Lord Campbell, C. J., Coleridge, Wightman, and Crompton, Jj. Lord Campbell then said that he had reserved the point in order that it might be brought before the Court of Error; but that he thought that Hunter *v.* Fry, 2 B. & Ald. 424, could not be distinguished.

giving judgment, says: "where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether." [POLLOCK, C. B.—Here the ship is described as being "of the measurement of 180 to 200 tons, or thereabouts." At what point would a variance from that description become material?] It may be difficult to fix the precise point. In Abbott on Shipping, p. 246 (8th ed.: p. 167, 5th ed.), more than one limit is mentioned. At all events it was for the plaintiffs to show that the actual excess was such as was contemplated and permitted at the time of the contract; Cross *v.* Eglin, 2 *679] B. & Ad. 106 (E. C. L. R. vol. 22). [JERVIS, C. J.—*The real criterion here is, whether this statement went to the profit and foundation of the voyage. But that is a question of evidence for the jury: we cannot decide upon it here.] Any positive statement in a contract, like that in the present case, tending to affect the judgment of the contracting parties, is a warranty, and, if it is in writing, is for the interpretation of the Court. In Lothian *v.* Henderson, 3 B. & P. 499, 515, Le Blanc, J., lays down, broadly, that "every positive averment or allegation on the face of the instrument, and making a part of the written contract," "amounts to a warranty, or condition." [WILLIAMS, J.—The defendant does not set up the statement here as a warranty, in which case his remedy would have been a cross action upon it; but rather as a condition precedent, the non-performance of which by one of the contracting parties is set up as a reason for the non-fulfilment of the contract by the other.] In either case the plaintiff must suffer for the breach of it. [MARTIN, B.—According to Clipsham *v.* Vertue, 5 Q. B. 265 (E. C. L. R. vol. 48), the plea should have stated that the size of the ship was of material importance in the contract: then, if the jury had found that allegation to be true, you might have succeeded.(*a*)] That was the form of the plea in Graves *v.* Legg, 9 Exch. 709;† but in Oliver *v.* Fielden, 4 Exch. 135,† a plea similar to this was held good.

JERVIS, C. J.—I am of opinion that this application must be refused. The defendant has had, substantially, what he contracted for. There was, no doubt, a variance to some extent between the actual tonnage *680] of the ship *and the statement of it in the charter-party. That variance, even if it had been to the extent of only a single ton, would have been fatal if such statement had amounted to a warranty. But, looking at the whole of the contract, and the intention of the parties as it appears upon the instrument, I think that this statement was not intended as a warranty, but merely as a matter of description, which has been practically complied with.

POLLOCK, C. B.—I am of the same opinion: and I think a rule was

(*a*) This allegation was introduced in the second plea.

rightly refused by the Court below. The present application does not touch the substantial merits of the case. If there had been a difference in the tonnage to any large extent, such as a thousand tons, that might have been some evidence of fraud; but that would have been a question for the jury. The plaintiffs have substantially fulfilled their contract.

CRESSWELL, J., and WILLIAMS, J., concurred.

MARTIN, B.—The question here arises upon the first plea; and I think that that plea would have been good on demurrer. It alleges that the ship was "of a measurement greatly and unreasonably exceeding 200 tons, and was not of the measurement of 180 tons to 200 tons or thereabouts." But I am of opinion that the question, whether the actual excess *was* great and unreasonable, was a question for the jury. I am not prepared to say that I should have been satisfied if they had found it was: but the question is a question of fact, with which we cannot deal here.

(CROWDER, J., had left the Court.)

*WILLES, J.—I think there was no warranty of the tonnage, the statement in the charter-party was nothing more than a representation of the belief of the owners upon that point, the vessel being ascertained and fixed by their description. [*681

Hannen, for the plaintiffs below (respondents), then applied for the costs of the appeal and of the proceedings below.

Per CURIAM.—We think you are entitled to the costs of the proceedings in both Courts.

Appeal disallowed. Costs allowed, both of appeal and of proceedings below.(*a*)

(*a*) Reported by Francis Ellis, Esq.

IN THE EXCHEQUER CHAMBER,

June 3.

GEORGE YOUNG, JAMES BEGBIE, and DAVID BEGBIE, Appellants, JOHANN AXELL MOELLER, Respondent.

Where the Court of Exchequer Chamber, under sect. 41 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), reverses upon appeal the decision of the Court below as to granting, discharging, or making absolute a rule, the appellant is, as a general rule, entitled to such costs as he would have had if the decision in the Court below had been in his favour, but not to the costs of the appeal.

IN this case, a verdict which had been found for the appellants (defendants below) was set aside by the Court of Queen's Bench, and a verdict entered for the *respondent (plaintiff below); Moeller *v.* Young, 5 E. & B. 7 (E. C. L. R. vol. 85). The defendants below having appealed, the Court of Exchequer Chamber, in Michael- [*682

mas Vacation, 1855, allowed the appeal; Young *v.* Moeller, 5 E. & B. 755.

Bramwell, for the appellants, then asked the Court (Cresswell and Williams, Js., and Parke and Platt, Bs.), for the costs of the proceedings in both Courts. By sect. 41 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), "The Court of appeal shall give such judgment as ought to have been given in the Court below; and all such further proceedings may be taken thereupon as if the judgment had been given by the Court in which the record originated." Here, if the Court below had discharged the rule, all the costs would have been payable by the plaintiffs below. The reasonable view appears to be, not indeed that the party who is in the wrong should be punished, but that the party who is in the right should be indemnified.

Bovill, for the respondent.—No such indemnification is given where the mistake is made by the Court below.

Parke, B.—The effect of our judgment now is that the rule for entering the verdict for the plaintiff below is discharged, and the verdict is not to be disturbed. That should give the respondents the costs as if the rule had been discharged below. But, as to the costs of the appeal, we will consider what the practice should be. *Cur. adv. vult.*

*683] *This day, immediately after the decision of Barker *v.* Windle, antè, p. 675, *Manisty*, on behalf of the appellants, asked for the decision of the Court on the point of costs.

Jervis, C. J.—The general rule as to the costs of the appeal is to be that, where the judgment below is affirmed, the respondent gets them; but the appellant does not get them upon a reversal of the judgment below.

Pollock, C. B., Cresswell and Williams, Js., and Martin, B., concurred.

No costs of appeal allowed; costs of proceeding below allowed to the appellants.

BENNETT *v.* THOMPSON. *June* 3.

Under stat. 13 & 14 Vict. c. 61, s. 12, the certificate of the Judge who tries an action brought in a Superior Court, that it appeared to him at the trial that there was a sufficient reason for bringing the action in that Court, may be given and endorsed on the record at any time after the assizes and before taxation of costs.

The sheriff is not entitled to fees from the party giving notice under The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), sect. 112, that a cause is to be tried by special jury: although the alteration of the system as to special juries has deprived the sheriff of the fees by which he formerly was remunerated by the party for summoning the special jurors.

This case was tried at the last Somersetshire assizes, before Channell, Serjt., and a special jury. The plaintiff had a verdict for 40*s*. The plaintiff's counsel then applied to the learned Judge for a certificate that

the action was brought to try a right, and also a certificate for a special jury. The learned Judge thereupon gave the following two certificates.

"*I certify that this action was really brought to try a right, besides the mere right to recover damages for the grievance for which this action was brought. [*684

"W. F. CHANNELL."

"I certify that this cause was a cause proper to be tried by a special jury.

"W. F. CHANNELL."

Both certificates were endorsed on the record.

On the taxation of costs, on 2d June, the defendant's attorney objected to plaintiff's costs being taxed, on the ground that neither certificate entitled the plaintiff to costs; that the first certificate was applicable only to cases where a less sum than 40*s.* was recovered; and that the plaintiff ought to have obtained either a certificate that this was a cause proper to be tried in this Court, or an order from this Court, or a Judge thereof, to tax. The master thereupon declined to tax. An application, on behalf of the plaintiff, was then made ex parte to the learned Judge for a certificate that there was a sufficient reason for bringing the action in this Court. The learned Judge expressed doubts whether he had power to give such certificate so long after the trial: but he endorsed on the record a certificate as follows.

"I certify that it appears to me that there was a sufficient reason for bringing this action in the Court in which the same has been brought.

"W. F. CHANNELL, 2d June, 1856."

It was now deposed that the learned Judge gave this certificate, not as a certificate in the cause, but for the purpose of showing this Court that he considered the cause a proper one to be tried in this Court, and for the *purpose of enabling this Court to make an order giving the plaintiff his costs, and upon the undertaking of the applicant not to use the certificate otherwise than for the purpose of certifying to this Court that there was sufficient reason for bringing the action in a Superior Court. It was further deposed that the action was brought for a smoke nuisance created by factories belonging to defendant, and was of considerable importance, and could not have properly been tried in any county court, in the judgment and belief of the deponent (plaintiff's attorney). [*685

On affidavit of the above facts:

Coleridge now moved for a rule to show cause why there should not be an order for costs, under stat. 15 & 16 Vict. c. 54, s. 4, or why the master should not tax the costs. Stat. 15 & 16 Vict. c. 54, s. 4, enables the Court, or a Judge at Chambers, on being satisfied that there was sufficient reason for bringing the action in the Court in which it is brought, to order that the plaintiff shall recover his costs; and the plain-

tiff shall thereupon have the same judgment to recover his costs as he would have had if stat. 13 & 14 Vict. c. 61 had not passed. Stat. 13 & 14 Vict. c. 61, s. 11, prohibits the plaintiff who recovers no more than 5*l.* in an action of trespass, case, &c., in the superior Courts, from having costs (except under certain circumstances not existing here): but, by sect. 12, if the Judge who tries the cause "shall certify on the back of the record" "that it appeared to him at the trial that there was a sufficient reason for bringing the said action in the Court in which such action was brought," the plaintiff shall have the same judgment to recover costs as if the Act *had not passed. Stat. 3 & 4 Vict. c. 24, s. 2, is inapplicable: had the damages been less than 40*s.*, the certificate actually given at the trial would have protected the plaintiff from losing his costs under that statute. [Lord CAMPBELL, C. J.—Why do you want an order under stat. 15 & 16 Vict. c. 54, s. 4, when you have the Judge's certificate under stat. 13 & 14 Vict. c. 61, s. 12?] The learned Judge was in doubt whether this last certificate was valid if not given at the time of the trial, and gave it only on the condition that this application should be made. It should seem, however, that he had the power to give it, just as he might have now signed a bill of exceptions.

*686]

Lord CAMPBELL, C. J.—We had better not give you a rule; there should be no doubt on the point. Sect. 12 of stat. 13 & 14 Vict. c. 61, s. 12, enables the Judge to certify "that it appeared to him at the trial;" it is not said that he is to certify at the trial. The certificate which you have got is sufficient to give you your costs: there can be no question as to the jurisdiction.

COLERIDGE, ERLE, and CROMPTON, Js., concurred.

Rule refused.

In the same cause,

Lush, in last Term, on behalf of the plaintiff, had obtained a rule calling on the sheriff of Somersetshire to show cause why he should not return to the plaintiff 4*l.* 13*s.* From the affidavits on which the rule was obtained it appeared that the plaintiff's attorney gave notice to the agents for the undersheriff for Somersetshire that the cause would be tried by a special jury at the *ensuing Spring Assizes. The undersheriff's agent claimed as fees 6*l.* 10*s.*; and, on being asked how they were made up, he gave the following account.

*687]

	£	*s.*	*d.*
Summonses and notices for service	1	16	0
Service	3	12	0
Officer attending trial	1	1	0
Jury pannel	0	1	0
	£6	10	0

The undersheriff's agents refused to give the plaintiff's attorney a copy of the pannel without payment of those fees. The plaintiff's attorney insisted that the sheriff was entitled to no fee except 1*s.* for a copy of the jury pannel. Afterwards the undersheriff's agent informed the attorney that, another party having since given notice that his cause also was to be tried by a special jury, the fees would only be 4*l.* 14*s.* This amount was paid: the rule now obtained was for the repayment of all, except the shilling admitted to be really due.

The affidavits in answer admitted the facts above stated, and added that, since The Common Law Procedure Act, 1852, abolishing the writs of venire and distringas, the expense and trouble to the undersheriff in summoning juries was not diminished; that the undersheriff had received from the secretary to the Treasury a notice as follows: "The question of an allowance to the sheriffs for the summoning of jurors of every denomination (with the exception of special jurors, who are paid by the suitors) having been for some time under the consideration of the Lords Commissioners of Her Majesty's Treasury, their Lordships desire me to acquaint you that they are pleased to allow *the sum of 24*l.* to be henceforth charged in the annual accounts of the sheriff of Somersetshire, as a commuted allowance for the summoning of jurors." This allowance of 24*l.* did not meet the undersheriff's expenses out of pocket, in respect of the juries to which it applied. When the notice that this cause was to be tried by a special jury was given, the undersheriff expected to have to summon a pannel of thirty-six special jurors; and, as, in the table of fees allowed under stat. 1 Vict. c. 55, the sheriff was entitled to charge 1*s.* for each warrant to summon a special juror, and 2*s.* for actually summoning him, he made out his fees on that scale. Subsequently, by a Judge's order, the pannel was made to consist of forty-eight jurors; but in the interim another party had given notice to have his cause tried by a special jury. The undersheriff therefore divided the fees for summoning the forty-eight jurors between the two parties, which explained the alteration in the amount charged. Since 1852 similar fees have been generally charged by the sheriffs, and allowed on taxation.

[*688

Bovill now showed cause.—The sheriff, when summoning a special jury, is put to expense and trouble. Under the old system he was remunerated by fees on summoning the special jurors, payable by those who occasioned it by demanding a jury. Since The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), the same trouble and expense are incurred; but it is in summoning one pannel for all. That pannel is not summoned unless one of the parties gives the undersheriff notice that his cause is to be tried by a special jury, under sect. 112. It is fair that the party should remunerate the sheriff for the trouble and expense thus *occasioned, and at the same rate as before. The old table of fees, allowed in pursuance of stat. 1 Vict. c. 55, is

[*689

not applicable to the altered jury process; but it could not be intended to cast the burthen upon the sheriff without remuneration. [COLERIDGE, J.—It may be that the table of fees ought to be altered; but by stat. 1 Vict. c. 55, s. 1, the sheriff must receive "such fees and no more as shall from time to time be allowed," under the sanction of the Judges.] The sheriff is, it appears, now actually out of pocket by doing his duty. [Lord CAMPBELL, C. J.—He ought to be properly remunerated for what he does; but it may be questioned by whom he should be paid.]

Lush, contrà.—The fees here taken are not to be found in the table of fees sanctioned by the Judges under stat. 1 Vict. c. 55.(*a*) Even supposing that the table ought to be altered so as, in future, to include similar fees, it cannot affect the present plaintiff.

Lord CAMPBELL, C. J.—The rule must be absolute. It may be very fit that the Judges should take an opportunity of considering whether new fees should be allowed to the sheriff, payable by the suitors in respect of what is done under the new special jury process, or whether the intention of the Legislature is to be taken to be that the summoning of special jurors is in future to be considered as a public duty, for which no fees are to be taken from the party, in which case the sheriffs will have a fair claim for compensation out of the public purse. Generally speaking the state ought to *supply the machinery for the administration of justice; and it may be fit that those whose causes are tried by special juries ought not to pay higher fees than others. On that I give no opinion; it is a subject very fit for consideration. But, at present, the sheriff has no authority to take the fees here taken. He is, by stat. 1 Vict. c. 55, s. 1, to take such fees, and no more, as shall from time to time be allowed by the taxing masters under the sanction and authority of the Judges. A table of fees has been sanctioned by them. There is in it a fee for the warrant to summon each special juror, and another for summoning him; but these are not applicable to the new system where one pannel is summoned for all. The sheriff therefore has, however innocently, taken fees to which he was not entitled, and must refund.

*690]

COLERIDGE, J.—The existing table of fees was not framed with a view to the present jury process. I agree that it is but just that the sheriff should be remunerated for his labour from some source or other; but, for the decision of the present case, it is enough to say that the table of fees allows none applicable to the existing state of the law.

ERLE, J.—I regret to be obliged to come to the same conclusion, which I think has the effect of taking away the remuneration for extraordinary work which it leaves to be done; but that must be remedied in some other way.

CROMPTON, J.—When a special jury was summoned for one cause

(*a*) See the table, 3 Chitty's Statutes, 1083.

only it was fit that the party should pay *for it. Now, when there is a pannel common to all, I do not see why the sheriff should not include in his bill of cravings the costs of one pannel as much as the other, both being public matters. But it is clear that the old fees are no longer applicable. Rule absolute. [*691

PERRY *v.* ATTWOOD and ATTWOOD. *June* 3.

Declaration alleged that plaintiff let mines to defendant, for twenty-one years, at a clear annual rent of 400*l.*, and a tonnage rent on the ore raised; the tonnage rent, if it amounted to or exceeded 400*l.*, to be taken instead of the 400*l.*; and, if it fell short of the 400*l.*, the 400*l.* to be paid, and the deficiency to be made up by deductions from the tonnage rent of subsequent years; and, if in any year the tonnage rent, upon ordinary working, did not come up to the 400*l.*, the excess of payment (if any) in previous years, above the 400*l.*, might be set off against the 400*l.* due on such year; the meaning of the parties being that the rent of 400*l.* should at all events be paid, but, if more than that was paid in any one year, and afterwards the mines should not produce enough to pay the 400*l.*, defendant should not, throughout the term, be liable to pay more than the 400*l.* per annum, inclusive of the extra rent raised by tonnage rent: covenant by defendant to pay the rents: breach, non-payment of tonnage rent upon the quantity of ore raised.

Plea: That defendant annually accounted with plaintiff each year concerning all the ore raised in that year, and the amount of tonnage rent; and, on each accounting, a certain sum was agreed by defendant and plaintiff to be the balance due, and the balances were paid by defendant to plaintiff, and accepted by plaintiff, in full satisfaction and discharge of the tonnage rent payable.

Replication: That the accountings were not correct, but ore was omitted which ought to have been included, by mistake, and through ignorance of facts on the part of the plaintiff; and the balances stated were for less ore than was raised; and the balances were paid and accepted on such accountings.

On demurrer to plea and replication, held:

That the plea, showing only a statement of accounts on one side, did not show a statement binding plaintiff, at any rate not conclusively, and was at any rate answered by the replication showing error in the account, though not fraud.

The declaration stated that Robert Jefferson, since deceased, and plaintiff, by deed, let to defendants certain mines and veins of iron ore, with liberties and powers for digging, &c., to have and to hold the said mines and veins, with the said liberties, &c., to defendants, their executors, administrators, and assigns, from 25th March, 1846, for the term of twenty-one years (determinable as in the deed mentioned); "yielding and *paying therefore, unto the said Robert Jefferson, and the plaintiff, and the survivor of them, and their assigns, or the heirs or assigns of such survivor, yearly and every year, during the said term, the clear annual rent or sum of 400*l.* of lawful British money, without any deduction or abatement whatsoever (except for property tax, and any other tax usually payable by landlords (if any) in the said county in respect of similar property), and by two equal and even half-yearly payments; that is to say," &c.; "such rent to be payable and paid as aforesaid, whether the said mines and minerals should or should not be opened and worked, and whether there should or should not be found any iron ore therein. And also yielding and paying, in manner [*692

aforesaid, unto the said R. Jefferson and the plaintiff, and the survivor of them, and their assigns, or the heirs and assigns of such survivor, yearly and every year, during the said term, the rent or sum of 2s. 9d. for every ton of iron ore, commonly called Cumberland Red Ore, which should be dug, wrought, won, raised, obtained, and gotten in, from or out of the said mines, pits, working lands, and premises, by virtue of the provisions of the said deed: each ton consisting of," &c. (mode of estimating tonnage): "such tonnage rent to be calculated up to and payable and paid on the 25th day of March in each and every year of the said term: provided always, and it was thereby declared and agreed by and between the said R. Jefferson and the plaintiff and the defendants, respectively, that, in any year or years of the said term when the tonnage rent as aforesaid, or the iron ore and minerals raised, won, gotten, and obtained in and from the said lands and premises in such year or
*693] years, should amount altogether to the sum of 400*l.* *or upwards, then the said tonnage rents, when paid, should be taken and considered as payment for and instead of the said annual fixed rent of 400*l.*, and the said fixed rent, in such year or years, should not be payable; and, if it should happen in any subsequent year or years that no ore or minerals should have been raised and gotten in and from the said lands as aforesaid, or the tonnage rents thereon should not amount altogether to the said sum of 400*l.*, then the said fixed rent of 400*l.* should be paid, and the deficiency in quantity of such year or years should be made up by deductions from the quantities of ore and minerals raised and gotten in any subsequent year or years beyond the quantities raised (and at the tonnage rent aforesaid) equivalent to the said fixed rent for such subsequent year or years; so that the tonnage rent or rents should not be paid or payable on the ore and minerals subsequently raised and gotten until the deficiency in quantity of any of the previous years should be made up as aforesaid: provided also that, in case the defendants, their executors, administrators, or assigns, should, in any preceding year or years of the said term, by reason of the extended working of the said mines, pay any sum or sums of money over and above the said fixed rent or sum of 400*l.*, and the said mines should not, by due and ordinary working thereof, in any subsequent year or years of the said term, afford a supply of ore equal, after the rate aforesaid, to the annual sum of 400*l.*, then and in such case it should and might be lawful for the defendants, their executors, administrators, and assigns, to take credit in account and to set off against the said fixed rent so much of the previous payment of excess of rent,
*694] beyond 400*l.*, in any one or *more years, as, with the ore raised in such year, should, at and after the rate of tonnage aforesaid, be equal to make up the sum of 400*l.* for that year; it being the true intent and meaning of the said parties thereto that a rent of 400*l.* per annum, payable half-yearly, should at all events be paid communibus

annis, during the term, for the license or leave thereby granted, and that, if more than 400*l.* should have been paid in any one year, and, by reason of the extra workings in any one or more year or years, or poverty of the said mine and premises, they should not be capable of yielding, on the ordinary working thereof, in any subsequent year, sufficient ore to pay the said fixed rent, calculating the ore raised after the rate aforesaid, the defendants should not be liable to pay, in the whole of the said term, a larger rent than the said sum of 400*l.* per year, inclusive of, and with, the extra rent so raised and paid by way of tonnage rent in previous years. And the defendants, by the said deed, covenanted with the said R. Jefferson and the plaintiff, their heirs and assigns, that they, the defendants, their heirs, executors, administrators, or assigns, or some or one of them, should and would well and truly pay or cause to be paid, during the continuance of the said term thereby granted as aforesaid, unto the said R. Jefferson and the plaintiff, their heirs or assigns, the said annual rent or sum of 400*l.*, and also the said tonnage rent so reserved as aforesaid, subject nevertheless as aforesaid, on the several days and times, and in the proportions, manner, and form, so mentioned and appointed in the said deed for payment thereof respectively as aforesaid, and according to the true intent and meaning of the said deed. And the defendants, by the said deed, also covenanted with *the said R. Jefferson and the plaintiff, their heirs or assigns, that they, the defendants, their executors or administrators, should and would provide and keep such and so many books of account as might be necessary, and wherein should be entered a full, true, and particular account in writing of all the iron ore and minerals which should be dug, won, raised, obtained, and gotten in, from, or out of the said mines, pits, and workings, and thereof should deliver to the said lessees, their heirs or assigns, a fair copy in writing of such account, monthly, during the said term." [*695

Averment: "That of the said fixed annual rent, so reserved as aforesaid, there is due and unpaid the sum of 200*l.* for one half year of the said term, ending on" 29th September, 1855; "and that of the said tonnage rent, so reserved as aforesaid, there is due and unpaid for iron ore, dug, wrought, won, raised, obtained, and gotten by the defendants, under and by virtue of the provisions of the said deed, the sum of 2000*l.*, according to the true intent and meaning of the said deed." Further breach in respect of defendants not keeping books or delivering accounts.

Plea (7), "to so much of the declaration as relates to tonnage rent alleged to have become due and payable by the defendants, under and by virtue of the said deed, for and during the eight years of the said term commencing with the year ending the 25th day of March, 1847, and ending with the year ending the 25th day of March, in the year of our Lord 1824." That defendants "did, during the said eight years

of the said term commencing with the year ending on the 25th day of March, in the year of our Lord 1847, and ending with the year ending on the 25th day of March, in the year of our Lord 1854, provide
*696] *and keep such books of account as were necessary; and that they caused to be entered therein an account purporting to be, and which defendants believed and still do believe to be, a full, true, and particular account in writing of all the iron ore and minerals dug, won, raised, obtained, and gotten in, from, or out of the said mines and premises in the said deed mentioned." That, soon after the expiration of each of the said eight years of the said term, the account so entered by the defendants in the said books was submitted for examination and correction to the plaintiff and the said R. Jefferson, in the lifetime of the said R. Jefferson, or to their agent in that behalf duly authorized, and to the plaintiff alone since the death of the said R. Jefferson, or to his agent in that behalf duly authorized. "That, soon after the expiration of each of the said eight years of the said term, and after the said accounts so from time to time rendered by the defendants had been examined by or on behalf of the plaintiff and the said R. Jefferson in the lifetime of the said R. Jefferson, and by or on behalf of the said plaintiff since the death of the said R. Jefferson, the defendants and the plaintiff and the said R. Jefferson in the lifetime of the said R. Jefferson, and the defendants and the plaintiff alone, since the death of the said R. Jefferson, stated an account of and concerning all the iron ore dug, won, raised, obtained, and gotten by the defendants, during the preceding year of the said term, in, from, or out of the said mines and premises, by virtue of the provisions of the said deed, and of and concerning the amount of tonnage rent payable by the defendants, under or by virtue of the said deed, for and in respect
*697] of the same iron ore: *and that, upon each of the first two of such accountings, the same having taken place in the lifetime of the said R. Jefferson, a certain sum was agreed, by and between the defendants and the plaintiff and the said R. Jefferson, to be the balance or sum due from the defendants to the said plaintiff and the said R. Jefferson; which balances or sums respectively were, soon afterwards, paid by the defendants to the said plaintiff and the said R. Jefferson, and accepted by them, as and for and in full satisfaction and discharge of the tonnage rent payable by the defendants to the plaintiff and the said R. Jefferson, by virtue of the said deed, for the years of the said term ending on the 25th day of March, 1847, and the 25th day of March, 1848: and that, upon each of the remaining six of such accountings, the same having all taken place after the death of the said R. Jefferson, a certain sum was agreed, by and between the plaintiff and the defendants, to be the balance or sum due from the defendants to the said plaintiff; which balances or sums, respectively, were afterwards paid by the defendants to the plaintiff, and by him accepted, as

and for and in full satisfaction and discharge of the tonnage rent payable by the defendants to the plaintiff, by virtue of the said deed, for the year of the said term ending on the 25th day of March, 1849, and for the five successive following years of the said term ending on the 25th day of March in each year." "That all the said eight balances or sums were paid and accepted as aforesaid more than three months before the commencement of this action."

Replication (2) to plea 7. "That the supposed accountings in that plea mentioned were not true and *correct accountings, according to the true intent and meaning of the said deed, of or concerning all the iron ore dug, won, raised, obtained, and gotten by the defendants under the said deed during the respective periods for which the said supposed accountings were respectively had or made, or of or concerning all the tonnage rent payable by the defendants under or by virtue of the said deed for or in respect of the same iron ore; but, on the contrary thereof, were, and each of them was, erroneous in this: that divers and very many tons of iron ore, which ought to have been included and taken into account in and upon the said supposed accountings respectively, and divers large amounts of tonnage rent payable by the defendants in respect thereof, under and by virtue of the said deed, were, by and through mistake, and in ignorance of the facts, on the part of the plaintiff and the said Robert Jefferson and their agents in that behalf, so far as relates to each of the first two of the said supposed accountings, and by and through mistake, and in ignorance of the facts, on the part of the plaintiff alone and his agents in that behalf, so far as relates to each of the residue of the said supposed accountings, omitted from, and not included or taken into account in or upon, the said supposed accountings respectively; and the balances or sums alleged to have been found and agreed to be due from the defendants for tonnage rent upon the said supposed accountings respectively, as in the said 7th plea mentioned, were erroneously found and agreed to be the balances or sums due from the defendants for the full amounts of tonnage rent payable by the defendants under the said deed for the *respective periods for which the said supposed accountings were respectively had and made: whereas, in truth and in fact, the said balances or sums were respectively balances or sums due from the defendants for tonnage rent, under the said deed, for fewer tons of iron ore for which tonnage rent was payable by the defendants, according to the true intent and meaning of the said deed, than had been actually dug, won, raised, obtained, and gotten by the defendants under the said deed during the respective periods for which the said supposed accountings were respectively had and made." "That the balances or sums, so erroneously found and agreed to be due from the defendants for tonnage rent upon the said supposed accountings respectively, were respectively paid and accepted as and for and in full

[*698

[*699

satisfaction and discharge of the respective amounts so erroneously found and agreed to be due from the defendants for tonnage rent upon the said supposed accountings respectively, and not otherwise howsoever."

The plaintiff also demurred to plea 7. Joinder.

Demurrer to the above replication. Joinder.

Atherton, for the plaintiff.—First, the plea is bad. It shows only an account stated on one side, introducing, therefore, no consideration for the agreement which it sets up; Smith *v.* Page, 15 M. & W. 683.† It would be otherwise if there had been a statement of cross accounts and a balance agreed to. The facts pleaded show no more, at the utmost, than evidence that the account really *stood as stated. *700] If it be said that the conduct of the plaintiff, as shown in the plea, renders the account conclusive till its correctness be impeached, the replication does in fact impeach the correctness, and truly, as admitted by the demurrer. [Lord CAMPBELL, C. J.—It is common to add, to a statement of accounts, "errors excepted:" I think that such exception must be understood, even where not expressed.]

Manisty, contrà.—Where there is a claim by one party upon another, and it is difficult to arrive at the precise amount, then, if, for the purpose of preventing the inconvenience of unsettled accounts, the parties agree to meet from year to year, and, on such meeting, agree to take a certain sum as the balance, both are bound, in the absence of fraud. Here fraud is not alleged; and the record shows a relation between the parties, and a contract which would produce accounts of much intricacy. [Lord CAMPBELL, C. J.—You put that as applicable to cases where the balance is not to be arrived at by mere enumeration.] In M'Kellar *v.* Wallace, 8 Moore's P. C. 378, 401, the law was thus laid down in the Privy Council. "Parties having accounts between them, may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced, and that all the information which is possessed on one side and the other should be furnished in the settlement of those *accounts; and, if it afterwards turn out that there *701] are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of equity. If, on the other hand, persons meet and agree, not to ascertain the exact balance, but agree to take a gross sum as the balance; a sum which one is willing to pay, and the other is content to receive as the result of those accounts: it is obvious, that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing these vouchers, upon the assumption that there are or may be errors in the account so settled; therefore, it is either an account stated and settled, in the formal sense of that expression, or, it is the case of a settlement

by compromise. In either case it may be vitiated by fraud." [Lord CAMPBELL, C. J.—That would be a case of accord and satisfaction.] The present case is so. It is clear that the defendants could not disturb the balance struck. The plea relies, not on the balance being in fact as found, but upon the agreement that it should be taken as the balance. In Smith *v.* Page, 15 M. & W. 683,† the plea relied upon the balance being found to be due, and being due. But, at any rate, that case must be considered as qualified by the later case of Callander *v.* Howard, 10 Com. B. 290 (E. C. L. R. vol. 70), where it was held that a plea of accounting, and payment of the balance found, showed a good defence, though it might be an argumentative plea of payment. [Lord CAMPBELL, C. J.—It can hardly be a plea of payment: it does not show that what was claimed by the *declaration has been paid. In Smith *v.* Page the Court expressly distinguishes the case from one where there are cross demands, as there were in Callander *v.* Howard.] The principle first suggested, that a smaller sum than that really due may be agreed upon, as a balance, for the purpose of settling demands otherwise incapable of being ascertained, will support this plea. [Lord CAMPBELL, C. J.—How is it incapable of being ascertained, more than the sum due upon a sale of coals or wheat?] A peculiar mode of measuring is here prescribed, and a very complex arrangement is made, extending through a series of years. As to the [*702

replication: it admits the agreement, and the payment of the balance agreed upon: it sets up a mistake of the parties, which is no answer in law, fraud not being suggested.

Atherton was not called upon to reply.

Lord CAMPBELL, C. J.—I am sorry that several successive yearly settlements should be disturbed; but we must decide upon the legal result of what has passed. It seems to me that the plea is insufficient, the account on one side only having been stated, which brings the case within the authority of Smith *v.* Page. The proceeding shown is not in the nature of accord and satisfaction, nor does it bind the parties: all that is said is, that there was a settlement of the account of claims on one side, a balance stated, and payment of that balance. No weight is to be attached to the allegation *that the payment was given and accepted in satisfaction of the tonnage rent due; there appears no consideration for a waiver of the debt actually due. The case does not fall within M'Kellar *v.* Wallace, 8 Moore's P. C. C. 378, or Callander *v.* Howard, 10 Com. B. 290 (E. C. L. R. vol. 70). If there were any doubt as to the plea, the replication would supply a complete answer, unless we could hold that a settlement of a claim at any one time was conclusive, and could not be questioned on the ground of mistake. As we cannot so hold, we must give judgment for the plaintiff. [*703

COLERIDGE, J.—I am of the same opinion. The plea certainly does not give a conclusive answer; and, that being so, the replication answers

the primâ facie answer given by the plea. The plea shows that it was agreed that a certain sum was the balance, and that this sum was paid. If it was meant that this sum was the real amount of the claim, the defendants would have pleaded payment. But this the plea cautiously avoids, and alleges only a payment of the supposed balance. The plaintiff answers: "True; but it turns out that the supposition was wrong." It would be a bad state of the law if such a settlement were conclusive, and could not be set right at law, and the only remedy were in equity.

ERLE, J.—We are to look to the contract of the parties. Their meeting, and agreeing to a balance, and the payment of that balance, do not constitute a performance. The arguments urged by Mr. *Manisty* *704] show that it would be well worth the while of parties, in the first *instance, to agree that every settlement, after three years or some other time named, should be conclusive. But, in default of such an agreement, I cannot find any rule leading us to hold that what has here taken place is a performance of the contract.

(CROMPTON, J., had left the Court.) Judgment for plaintiff.

The Mayor, Aldermen, and Burgesses of the Borough of LIVERPOOL *v.* The Overseers of WEST DERBY. *June* 4.

By a local Act, commissioners were empowered to erect waterworks for the purpose of supplying water for watering the streets, use in case of fires, and other public purposes in Liverpool, and to levy a rate on the borough for the expenses thereof. The Act contained express prohibitions against using this water for domestic purposes. The Commissioners erected waterworks in the adjoining township of West Derby. By subsequent Acts the property and powers of these commissioners became vested in the municipal corporation of Liverpool.

Water was supplied in Liverpool for domestic purposes by trading companies from waterworks also situated in the township of West Derby. The municipal corporation were, by a local Act, empowered to purchase the undertakings of these companies, and for that purpose to borrow money. When purchased, the Corporation were to supply water for domestic purposes to the inhabitants of Liverpool, which then comprised the parish of Liverpool and part of the township of West Derby, and of parts of other townships, with power to supply the inhabitants of an adjoining district, including the whole township of West Derby. It was enacted, that they were so to regulate the charges for the water so supplied as to raise no more money than the interest of the money borrowed and the expenses of managing the waterworks. The purchase was completed; and those waterworks were vested in the Corporation.

By a subsequent Act, the Corporation were empowered to use the water from the commissioners' waterworks and the company's waterworks indiscriminately; and the pipes were accordingly united; and the two sets of waterworks were occupied in common.

Held, that the Corporation were rateable in the township of West Derby for the waterworks there occupied by them under these enactments.

BY a rate for the relief of the poor of the township of West Derby, in the county of Lancaster, made on the 5th day of May, 1855, and duly published and allowed, The Mayor, Aldermen, and Burgesses of the Borough of Liverpool were assessed in the following form.

Rate Book, No.	Arrears due or assessed.	If enquired, write the word examined.	Street. No.	Name of Occupier.	No. of Voters.	Name of Owner.	No. of Voters.	Description of Property rated.	Name or situation of Property.	Estimated extent.	Gross estimated Rental.	Rateable Value.	Rate at 1s. 1d. in the pound.	Amount of rate assessed upon and payable by the owner, instead of the occupier by virtue of the statute in that behalf.
1478				Mayor, Aldermen and Burgesses of Liverpool.		Same.		Land, cooling ponds, engines, cottages, buildings, and pipes.			£3200	£2900	£157 1 8	
2224				Mayor, Aldermen, and Burgesses of Liverpool.		Mayor, Aldermen, and Burgesses of Liverpool.		Land and pipes.			550	500	27 1 8	

*Against these assessments the Mayor, Aldermen, and Burgesses appealed to the Court of Quarter Sessions for the county of Lancaster, upon the ground that the property for which they were rated was not rateable for the relief of the poor of the township: and by consent of the parties, and under an order of a Judge, the following case was stated for the Court of Queen's Bench. [*706

By the local Act, 11 G. 4, c. xv.,(*a*) sect. 1 (since repealed by stat. 9 & 10 Vict. c. cxxvii.,(*b*) sect. 6), commissioners were appointed for putting that Act into execution. By sect. 51 the commissioners were authorized to cause any of the public streets within the parish of Liverpool, which was then conterminous with the borough, to be watered as often as they should think fit, and also to cause any wells to be sunk and pumps to be erected for the purpose of watering the same; and all the expenses incident thereto were to be defrayed out of the rates to be raised under and by virtue of that Act; and the water to be obtained from such wells was to be applied to no other purposes than those of watering the streets, except in cases of fire. This Act was amended by stat. 5 & 6 Vict. c. xxvi.; (*c*) and it was further amended, and further powers were given to the commissioners, by stat. 6 & 7 Vict. c. lxxv.(*d*)

*Under the provisions and for carrying out the purposes of the above-mentioned Acts, the commissioners purchased land at [*707

(*a*) "For the better paving and sewerage of the town of Liverpool in the county Palatine of Lancaster; and for settling the boundaries between the said town and the townships of Kirkdale and parts of the townships of Everton and West Derby."

(*b*) "For the improvement of the sewerage and drainage of the borough of Liverpool, and for making further provisions for the sanatory regulations of the said borough."

(*c*) "For amending an Act relating to the paving and sewerage of the town of Liverpool, in the county Palatine of Lancaster."

(*d*) "For enabling the commissioners for paving and sewering the town of Liverpool, more effectually to water the streets of the said town, and to provide water for extinguishing fires therein."

Green Lane in the township of West Derby, and without the borough of Liverpool, which forms part of the property now rated as aforesaid, and called "the plant of the Green Lane Water Works," and thereon sunk a well, and erected steam-engines, pumps, and other works for pumping of water, which they thereupon conveyed by pipes (part of which are in the part of West Derby which is not within the borough of Liverpool, and which are the subject-matter of the second assessment above mentioned, and part of which are in West Derby, within the borough, and are not rated) to a reservoir (also in the township of West Derby, but within the borough and not rated); and the water was used and distributed pursuant to the above-mentioned Acts. The whole of West Derby is within the limits of the Acts. The Liverpool Sanatory Act (9 & 10 Vict. c. cxxvii.), after reciting various local Acts, including the foregoing Acts, recites that the borough of Liverpool, as extended, comprises not only the town and borough of Liverpool, and a portion of Toxteth Park, but also the townships of Everton and Kirkdale, and part of West Derby, which three last-mentioned townships had become populous; and no provision had been made for (inter alia) the supply of water for public purposes therein: and that it was expedient that the powers to be granted for the said purpose should be continued under one management, and should be uniform throughout the whole of the said borough; and The Mayor, Aldermen, and Burgesses of Liverpool, by the council of the said borough, are thereby empowered to carry the same into execution. The Act then, in sections 136, 137, 138, and

*708] *others, transfers the property, powers, and privileges of the commissioners under the above-mentioned Acts to the Corporation, and vests the property of the commissioners in the Corporation. The Act then makes other provisions for enabling the Mayor, Aldermen, and Burgesses to supply water for public purposes in the borough of Liverpool, and, by sect. 154, provides for the raising of money by rates and otherwise for defraying the expense thereof. Under and by virtue of this Act, the Corporation entered upon and became the occupiers of the Green Lane Water Works, and the plant and pipes and mains belonging thereto, and used and exercised the powers conferred upon them by the Act. The various Acts of Parliament heretofore cited relate, so far as they affect this question, solely to the supply of water for public purposes.

Up to the year 1848 the water used for domestic purposes, throughout the borough of Liverpool, was supplied by two private water companies, constituted under various Acts of Parliament, which may be referred to as part of this case on the argument. By stat. 10 & 11 Vict. c. cclvi.(*a*) (The Liverpool Corporation Water Works Act, 1847)

(*a*) Local and personal, public: "For better supplying with water the borough of Liverpool and the neighbourhood thereof, and for authorizing the Mayor, Aldermen, and Burgesses of the said borough to purchase the Liverpool and Harrington Waterworks, and Liverpool Waterworks."

the works of these water companies were transferred to the Corporation, and powers were thereby given to the Corporation for the supplying of water to the inhabitants, both for public and private purposes, and to make and use new waterworks for that purpose. Various provisions are contained in this Act relating to the construction and maintenance of works, and the supply of water, and levying rates and *charges [*709
for the same, and the keeping of an account to be called the Liverpool water account. The 122d section of the Act authorizes the borrowing of money on the credit of this account; and the 125th (a) and following sections provide for the application of the moneys in the water account, and the reduction of the rates of charge, so that no more should be raised than may be necessary to meet the expenditure on the water account.

Under and by virtue of this Act the Corporation entered upon and became the occupiers of the works of the two water companies, and supplied certain of the inhabitants of the districts named in that Act with water. Further powers were given to the Corporation by stat. 13 & 14 Vict. c. lxxx.; (b) and, by stat. 15 & 16 Vict. c. xlvii.,(c) after reciting that doubts had arisen, it *was enacted that the Corpo- [*710
ration might supply water obtained by them under all or any of the Acts, for all or any of the purposes for which water might be supplied under the said Acts. Since the passing of stat. 10 & 11 Vict. c. cclxi. the water, used both for public and domestic purposes in the said borough, has been supplied by the Mayor, Aldermen, and Burgesses under its provisions, and under the provisions of stat. 9 & 10 Vict. c. cxxvii.; and the whole of the property rated is held and occupied by the said Mayor, Aldermen, and Burgesses, solely for the purposes and under the provisions of the said Acts, and for supplying water under and by virtue of their authority, and consists of waterworks and pipes used for that purpose only. Before the making of the rate now in question the Mayor, Aldermen, and Burgesses caused the mains which

(a) Sect. 125. "That the council shall, from time to time, so regulate the rates and charges to be made for the supplying of water under the provisions of this Act that the amount of such rates and charges, with the aid of the water rate to be levied under the first-recited Act, shall be as near as may be sufficient to pay the interest upon any money borrowed on the credit of the said water rate, and of the money from time to time borrowed for the several purposes of this Act, together with the costs of managing and conducting the works by this Act and the said first-recited Act authorized to be made and purchased, and such further sum (not exceeding 1*l.* per centum per annum on the money borrowed) as is authorized to be set apart under the provisions hereinbefore contained; and if in any year the amount received shall be more than sufficient for all the purposes aforesaid, the council shall, and they are hereby required to make a proportionate reduction in the rents and charges to be in the next year made in respect of water supplied under and by virtue of this Act."

Sects. 126, 127, and 128 contain provisions for enabling the Recorder, on appeal, to compel a reduction of the charges in pursuance of sect. 126.

(b) "To extend the time limited by the Liverpool Corporation Waterworks Act, 1847, for purchasing lands and constructing the works authorized by such Act, and for other purposes."

(c) "For further amending the local and personal Acts, 9 & 10 Vict. c. cxxvii. and 10 & 11 Vict. c. cclxi., relating to the Liverpool Corporation Waterworks; and for authorizing deviations, and the construction of reservoirs; and for other purposes."

had formerly belonged to the commissioners, and the mains of the water companies, to be connected, so that the water arising from the various sources, in the said Acts and in this case mentioned, might be, and it is, used indiscriminately for public and domestic purposes. The said Mayor, Aldermen, and Burgesses have collected and charged rates authorized by the Acts, and have appropriated the same as by the said Acts authorized in this case. The Acts of Parliament herein mentioned may all be referred to and are to be taken as part of the case: and copies of the material Acts accompany this case. The appellants contended, before the Court of Quarter Sessions, that they had no beneficial occupation, and that their occupation was solely for public purposes, and that they were restrained from making any profit or deriving any benefit. And that the moneys derived from the waterworks were specifically

*711] appropriated by Act of Parliament to purposes other than and *inconsistent with the payment of rates, and that they were not liable to be rated.

The question for the Court of Queen's Bench is whether the appellants are rateable or not. If the Court is of opinion that the appellants are rateable, the rate is to stand confirmed; if of the contrary opinion, the rate to be amended by striking out that part thereof in which appellants are so rated.

The case was now argued.(*a*)

Monk, in support of the rate.—The grounds on which the property is said not to be rateable must be, either that it is property occupied for public purposes, or that the Acts, expressly or by implication, exempt the occupiers from rateability. Neither ground is tenable.

In Regina *v.* Badcock, 6 Q. B. 787 (E. C. L. R. vol. 51), it was pointed out that there was great difficulty in considering any local purposes as public, for the purpose of exempting from rateability. The subsequent cases of Regina *v.* Longwood, 13 Q. B. 116 (E. C. L. R. vol. 66), Regina *v.* Kentmere, 17 Q. B. 551 (E. C. L. R. vol. 79), Regina *v.* Harrogate Commissioners, 15 Q. B. 1012 (E. C. L. R. vol. 69), Regina *v.* Overseers of Longwood, 17 Q. B. 871, Mayor of Manchester *v.* Overseers of Manchester, 17 Q. B. 859, decide that waterworks occupied for the use of a district are rateable. The case is analogous to that of a Local Board of Health: Regina *v.* Justices of Hull, 4 E. & B. 29 (E. C. L. R. vol. 82). As to the second ground: If the Act had enacted that the Corporation should not apply any por-

*712] tion of the produce of the *waterworks to the payment of rates, it would have exempted them from rateability; but the enactment in question does not substantially differ from that in the Birkenhead Dock Acts, which has been held not to have that effect: Birkenhead Dock Trustees *v.* Birkenhead Overseers, 2 E. & B. 148 (E. C. L.

(*a*) Wednesday, June 4th. Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, J. Crompton, J., left the Court before the conclusion of the argument.

R. vol. 75). Rex *v.* Liverpool, 7 B. & C. 61 (E. C. L. R. vol. 14), was considered in that latter case; and, if it was not satisfactorily distinguished, it was overruled. The cases of Regina *v.* Mayor, &c., of Liverpool, 9 A. & E. 435 (E. C. L. R. vol. 36), and Regina *v.* Exminster, 12 A. & E. 2 (E. C. L. R. vol. 40), occasioned the passing of stat. 4 & 5 Vict. c. 48. In that enactment was an exception, that, where the property was held entirely in trust for a district, co-extensive with the district on which the poor-rate was, the property should not be rated. That was on the principle, as has been said, that in such a case "it was as broad as it was long." But it is not the case here. The greater part of the district benefited by the Liverpool Waterworks is out of the township of West Derby.

C. Milward, contrà.—The effect of stat. 10 & 11 Vict. c. cclxi. s. 125, is, that the Corporation are to keep down the proceeds to the amount necessary to pay interest and the costs of managing the works; it forbids the making of a profit; and there is therefore no profitable occupation in respect of which to lay the rate. [Lord CAMPBELL, C. J.—Those in trust for whom those works are carried on receive a pecuniary benefit, if they get their water cheaper.] Those who receive such a benefit are the entire population of Liverpool, the shipping of that port, and strangers who pass through it. These are the public, at least as much as the county rate-payers of *Chester; Rex *v.* Weaver Navigation, 7 B. & C. 70, n (c). Rex *v.* Liverpool, 7 B. & C. [*713 61 (E. C. L. R. vol. 14), proceeded entirely on the direction to reduce the rates, which is similar to that in the present Act. [COLERIDGE, J. —If those cases were decided on the principle for which you cite them, can you reconcile them with the recent decisions in this Court?] They have never been overruled. [Lord CAMPBELL, C. J.—Rex *v.* Liverpool has certainly always been treated with a certain degree of respect; and in all our decisions it has been supposed to be distinguished, not overruled.] The time seems now to have come when it must be either acted upon or overruled.

Monk was heard in reply. *Cur. adv. vult.*

Lord CAMPBELL, C. J., in this Term (June 12), delivered judgment.

By the Acts of Parliament, referred to in the case, land used for waterworks lying in several parishes is vested in the Corporation of Liverpool for the purpose of supplying water to the inhabitants particularly, and to the town generally. The Corporation as such takes no benefit; but it occupies as trustee for the beneficial interest of others; and such occupation has been held in several cases to be rateable; see Regina *v.* Longwood, 13 Q. B. 116 (E. C. L. R. vol. 66), Regina *v.* Harrogate Commissioners, 15 Q. B. 1012 (E. C. L. R. vol. 69), Birkenhead Dock Trustees *v.* Birkenhead Overseers, 2 E. & B. 148 (E. C. L. R. vol. 75). We adhere to those cases, and hold that this Corporation is not exempt from rating, although it occupies only as trustee.

*714] *By stat. 10 & 11 Vict. c. 261, ss. 125, et seq., provision is made for keeping down the water rates, to be levied on the consumers to the amount necessary for defraying the expense of managing the works and supplying the water, without making any profit on the supply: and therefore, as the parishes where the water is consumed and the profit, if any, would arise cannot rate for a profit which is prohibited, it was contended that the whole apparatus yielded no rateable value, and that all the land was exempt. But, where land lying in several parishes was used for reservoirs, engines, and other machinery necessary for bringing water to other parishes, in which by service pipes the water was distributed to consumers and yielded profit, it was held, in Regina *v.* Mile End Old Town, 10 Q. B. 208, 210 (E. C. L. R. vol. 59), that the parishes, in the first category, might rate the lands lying in them, according to the ordinary principle, that is according to the probable rent which, "as land and buildings deriving some additional value from their capacity of being applied to such purposes as that of a water company," they would yield, and that the parishes in the second category, where profits were made by water rates on service pipes, might take those profits into the account and rate for them in rating the service pipes. And it seems to us that the principle of that case is applicable to remove the objection to rateability now under consideration. Land taken for waterworks and indirectly conducing to the profitable supply of water is rateable, irrespective of the profit derived from that supply. If the profit on the supply were to be rated, the sums paid

*715] for such rates on the land would have to be *deducted from the gross receipts, as one of the expenses of management, in ascertaining the net profit which is to be rated.

It seems to us clear that the land here in question is rateable on the principle thus applied in Regina *v.* Mile End Old Town, 10 Q. B. 208; it is also clear that this objection was fully considered in Birkenhead Dock Trustees *v.* Birkenhead Overseers, 2 E. & B. 148 (E. C. L. R. vol. 75), and then overruled. And, as the question referred to us is, Whether the appellants are rateable, and no other objection has been made, we answer that question in the affirmative.

Judgment for the respondents.

The QUEEN *v.* The Guardians of the HOLBORN UNION.

June 4.

An order for binding a pauper child apprentice, under stat. 56 G. 3, c. 139, purported to be made by "two justices for the county of Middlesex," and to be signed and sealed by them at "the Police Office, Hatton Garden."

In the Metropolitan Police Act (10 G. 4, c. 44) "Hatton Garden" is mentioned as one of the places in Middlesex forming the Holborn division of the Metropolitan Police District.

Held, that jurisdiction sufficiently appeared on the face of the order, as the Court would take judicial notice from the Act that Hatton Gardon was in Middlesex.

ON appeal against an order of two justices, in and for Middlesex, adjudging the settlement of Eliza Hart, a lunatic, to be in the parish of St. Andrew Holborn, above the Bars, in Middlesex, in the Holborn Union, and adjudging the guardians of that union to pay certain moneys: the Sessions confirmed the order, subject to a case, by which it appeared that the husband of the lunatic had been bound as a parish apprentice by the overseers of Clerkenwell, and had, under such *apprenticeship, acquired a settlement in the appellant parish, if the order for binding him was duly made. The order began [*716 "Middlesex, to wit." It was dated 27th June, 1836, purported to be by two justices for the county of Middlesex, and to be executed by them "under our hands and seals at the Police Office, Hatton Garden." The objection was taken that it did not appear, on the face of it, that the order was made within the jurisdiction of the justices, that is, in Middlesex. The Sessions overruled the objection.

Metcalfe, in support of the order of Sessions.—It is admitted that it must appear on the face of the order that it was made in Middlesex. In this case, it appears to be made at "the Police Office, Hatton Garden." By the first Metropolitan Police Act (10 G. 4, c. 44), sect. 4, "the city and liberties of Westminster, and such of the parishes, townships, precincts, and places in the counties of Middlesex, Surrey, and Kent, as are enumerated in the schedule to this Act, shall be constituted" into the Metropolitan Police District. In the schedule amongst the places in the county of Middlesex, forming the Holborn division of the Metropolitan Police District, are enumerated "the liberty of Saffron Hill, Hatton Garden, and Ely Rents." The Court, therefore, being informed by a public Act that Hatton Garden is in Middlesex, will take judicial notice that the order, which was made at the police office there, was made in that county.

Huddleston, contrà.—In Regina *v.* St. George, Bloomsbury, 4 E. & B. 520 (E. C. L. R. vol. 82), the Court decided that an order made by two *justices "at the board room of the Holborn Union" [*717 was bad, as not sufficiently appearing to be made in Middlesex. The police office may be in some other part of the district. [Lord CAMPBELL, C. J.—If we are to take judicial notice that there is a place called Hatton Garden in Middlesex, we must assume, at least till the

contrary is shown, its identity with the place of the same name at which the order is made.]

Lord CAMPBELL, C. J.—A public Act describes Hatton Garden as in the county of Middlesex. That is the distinction between this case and Regina *v.* St. George, Bloomsbury. I cannot doubt that the jurisdiction is sufficiently shown.

COLERIDGE and ERLE, Js., concurred.

(CROMPTON, J., had left the Court.) Order confirmed.

---

*718] *J. H. GILL and Others *v.* JOSE. *June* 5.

Under stat. 7 W. 4 & 1 Vict. c. 55, s. 3, a sheriff's officer is liable to an attachment if he take more than 6*d.* per mile for mileage on executing a fi. fa. where the distance exceeds five miles, the allowances sanctioned by the Judges under sect. 2 being only 6*d.* per mile. Although in the particular county it appears that the custom has been to take 1*s.* per mile.

COLLIER, in last Easter Term, obtained a rule calling upon Joseph Short to show cause why an attachment should not issue against him for his contempt in taking and demanding certain fees not allowed by law, or under stat. 7 W. 4 & 1 Vict. c. 55.

From the affidavits it appeared that Joseph Short was an officer of the Sheriff of Cornwall, who had executed a fi. fa. in the above case. Among other charges were the following: "Executing warrant, 1*l.* 1*s.* Mileage, 16 miles, 16*s.*" Short deposed: "I charged one shilling a mile, which is the amount always charged by sheriffs' officers in the county of Cornwall, for travelling in executing a warrant, as I have been informed by many sheriffs' officers, and taken." Other items were objected to; but the Court considered that these were sufficiently explained by the affidavits; and no further notice of them is necessary.

Kinglake, Serjt., now showed cause.—By the table of fees, sanctioned by the Judges under stat. 7 W. 4 & 1 Vict. c. 55, s. 2, the mileage chargeable is only 6*d.* per mile: and, by sect. 3, it is a contempt to take more. But it appears to be the custom in Cornwall to allow 1*s.* per mile.

Collier, contrà, insisted upon the table.(*a*)

*719] *Lord CAMPBELL, C. J.—No answer is given to the complaint as to the mileage charge. The practice which appears to have prevailed in Cornwall is contrary to the statute, although no great blame can be thrown upon the officer, as for a mala praxis. We make the rule absolute: but the attachment must not issue if, in the course of a week, the excess of mileage be repaid, with the costs of this application.

COLERIDGE, ERLE, and CROMPTON, Js., concurred.

Rule absolute.

(*a*) See the table, 3 Chitty's Statutes, 1033.

THOMAS TYERMAN *v.* SARAH SMITH. *June* 5.

On a compulsory reference under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), it is no objection to entering up judgment on the award, under sect. 3, that the award was made more than three months after the arbitrator entered on the reference, though the order of reference names no time, and no written consent for enlarging the time has been given by the parties, if it appear that the parties have, within a month before the making of the award, acted upon the reference as still subsisting, such acting estopping them from saying that the circumstances necessary to give jurisdiction to the arbitrator did not exist.

PHIPSON, in this Term, obtained a rule calling on the defendant to show cause why the judgment signed upon the award made in this cause, and all subsequent proceedings, should not be set aside, such judgment being irregular and not warranted by The Common Law Procedure Act, 1854. And why the defendant should not pay the costs of this application.

The rule was not drawn up on reading any submission or award. From the affidavits on which it was obtained, it appeared that, under sect. 6 of The Common Law Procedure Act, 1854, by order of Crompton, J., dated 5th June, 1855, this cause was referred to Sir Archer *Denman Croft, Bart., one of the Masters of this Court. The order specified no time within which the award was to be made. [*720 The Master entered on the reference on 3d July, 1855. The plaintiff attended meetings on the 3d, 4th, 6th July, 30th October, and 3d November, 1855, and 5th and 7th January, 1856; and there were subsequent meetings which were not attended by the plaintiff or on his behalf. The arbitrator made his award on 7th February, 1856, which was, in effect, for payment by plaintiff of the costs of the cause, the reference and the award. On 21st April, 1856, the order of reference was made a rule of Court. On the same day, the plaintiff obtained a rule Nisi for setting aside the award, or referring it back to the arbitrator, on the ground that the arbitrator had proceeded ex parte in the absence of the plaintiff, the plaintiff having material evidence to produce. This rule was discharged with costs on 7th May, 1856. The costs were afterwards taxed: and, on 14th May, 1856, judgment was entered up by defendant. No written consent had been given by either party for enlarging the term for making the award.

Affidavits made by the plaintiff, at former stages of the proceeding, were also brought before the Court; by which it appeared that, on January 31st, 1856, the plaintiff wrote a letter to his attorney, referring to a notice of a meeting which had been given, stating his inability to attend, and urging that "the arbitrator must, if you please, be requested to enlarge the time, as a matter of simple justice." Copies of this letter were handed to the arbitrator and to the defendant's attorney. One of these affidavits set out the award verbatim.

The affidavit in answer stated several facts with the view of showing

*721] unfair conduct on the part of the *plaintiff, both as to the subject-matter of the suit and as to the proceedings on the reference: but it did not materially alter the facts bearing on the point ultimately decided.

Udall and *R. A. Cross* now showed cause.—The objection is that judgment cannot be signed on this award. Unless the award is void, this, being a compulsory reference under sect. 6 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), is, by sect. 3, to be enforced like the finding of a jury; and it is necessary that judgment should be signed, in order to warrant a fi. fa.; Kendil *v.* Merrett, 18 Com. B. 173 (E. C. L. R. vol. 86). But it is contended that the award is void, because not made within three months after the reference was entered on, and there being no written consent of parties to enlarge the term, by sect. 15 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). In order to raise this objection, the submission and the award should be before the Court; Doe dem. Madkins *v.* Horner, 8 A. & E. 235 (E. C. L. R. vol. 35). [*Phipson.*—The affidavits show that this was a compulsory reference, under sect. 6; and the award itself is set out in the body of one of the affidavits.] The arbitrator began to act on 3d July, 1856; and the plaintiff attended meetings as late as 7th January. The plaintiff is estopped, by his own conduct, from taking the objection that, at that time, there was no consent in writing to give the arbitrator jurisdiction. If there was, he had, under sect. 15, a month from that day for making of the award; and he made it on 7th February. But, further, the plaintiff, in his letter of January

*722] 31st, 1856, treats the arbitration as still going on, requesting *the arbitrator to enlarge the time; and, after the award is made, he applies unsuccessfully to have it sent back to the arbitrator. Under these circumstances there was clearly a consent to enlarge the time; Rex *v.* Hill, 7 Price, 636. It might be argued that this amounts to a written consent; but, at least, the conduct of the plaintiff estops him from denying the authority of the arbitrator. That was the principle of the decision in Andrewes *v.* Elliott, ante, p. 338,(*a*) where, a Nisi Prius commissioner having, by consent of parties, tried and determined an issue without the preliminaries required by stat. 17 & 18 Vict. c. 125, s. 1, it was held that the parties were precluded, by their consent, from objecting to the want of jurisdiction. Further, under sect. 9, the award is final, no application to set it aside having been made within the first seven days of Easter Term, 1856.

Phipson, contrà.—The cases which have occurred before the statute are inapplicable, this arbitration being the creature of the statute: so that the only question is, whether the parties have consented in writing to enlarge the time. The provisions of the statute, authorizing a com-

(*a*) In Exch. Ch., affirming the judgment of Q. B. in Andrews *v.* Elliott, 5 E. & B. 502 (E. C. L. R. vol. 85).

pulsory reference and giving to the award the effect of a verdict, are very stringent; and the Court will be cautious in allowing supposed equivalents to the conditions which the statute has prescribed. There cannot be a parol consent for an enlargement of the time incorporating the statutory powers. [ERLE, J.—Might not parties meet and agree to appoint an arbitrator who should have the powers which the statute gives in the *case of a compulsory reference?] They might so; that would be a reference de novo. [Lord CAMPBELL, C. J.— Then why may not parties superadd such powers in the case of a compulsory reference already going on?] That would surely be very dangerous. [ERLE, J.—I cannot see how that would be more dangerous than allowing the parties to create such powers in the first instance. COLERIDGE, J.—Suppose the statute said nothing about the enlargement of time.] But here there is a specific enactment. There might as well be a parol waiver of the provisions of the Statute of Frauds. [CROMPTON, J.—That statute contains an express prohibition.] Andrewes *v.* Elliott, 6 E. & B. 338 (E. C. L. R. vol. 87), is not applicable. The question there arose as to the jurisdiction of the Nisi Prius Commissioner, Mr. Bramwell; and the power which he exercised was such as might have been conferred on him without the statute. But in the present case there is no power to sign judgment on the award, independent of the statute. That in such a case it is essential to show the existence of that which the statute makes essential to the jurisdiction, appears from the principles recognised by this Court in Regina *v.* Grant, 14 Q. B. 43 (E. C. L. R. vol. 68). As to sect. 9, it merely prohibits applications being made after a certain time to set aside an award: this is not such an application. The doctrine laid down in Braddick *v.* Thompson, 8 East, 344, is, at any rate, inapplicable to objections going to the foundation of the jurisdiction. The question now is whether a peculiar process is to be followed, when it is contended that the conditions authorizing such process have not been fulfilled.

[*723

*Lord CAMPBELL, C. J.—Mr. *Phipson* has done his duty, and no more: but the conduct of his client has been most fraudulent throughout the whole of the transaction. This I mention for the purpose of saying that I covenant with myself not to be influenced by that consideration. I proceed on the ground that the plaintiff is estopped by his conduct from objecting that there was no written consent for enlarging the time. It is admitted that the award would be good if there were such consent; but it is contended that, for want of it, the statutable authority does not exist. But I think that the plaintiff is estopped from saying that there was not such a written consent as was essential to the statutable authority. Andrewes *v.* Elliott is expressly in point. Mr. Bramwell (and the case would have been the same had he then been a judge of the superior courts) had no jurisdiction without certain statutory requisites; and, had it been competent to the plain-

[*724

tiff to show that those requisites had not been fulfilled, the proceeding would have been void: but the principle of personal exception applied to the plaintiff. So here the plaintiff cannot be heard to say that there was no written consent: and we must therefore assume that the arbitrator proceeded under the statutable powers, and that the award is good, and the judgment properly signed.

COLERIDGE, J.—The analogy between this case and Andrewes *v.* Elliott is complete. Mr. Bramwell was a judge under the Nisi Prius commission, and could have tried the case with a jury: and the statute, *725] under certain limited conditions, gave him the power to try *by himself, a power derived, not from his general authority, but from the statute. We, and the Court of Exchequer Chamber, thought that the plaintiff, by his consent, was estopped from denying that the statutable conditions had been fulfilled. So here the Master had the power to take a compulsory reference; but he could make his award only within the three months, unless there were a written consent for the enlargement of the time. Now the plaintiff's conduct has been such as to estop him from contending that there was no written consent.

ERLE, J.—I concur in what has been said. The Master had the three months to make his award in, and, in case of a consent in writing, any further time: there is no express enactment that without such consent the award shall not be made after three months. At the expiration of the three months, both parties acted as if the arbitrator was still exercising a valid authority. It is decided, by Pickard *v.* Sears, 6 A. & E. 469 (E. C. L. R. vol. 33), and other authorities, that a party who holds out a fact as true, and induces the other party to act on the belief of the fact, is precluded from denying the fact. The plaintiff is therefore here concluded from denying the facts essential to the jurisdiction of the Master.

CROMPTON, J., concurred. Rule discharged.

*726] *MARVIN *v.* WALLIS. *June* 5.

Plaintiff sold a horse to defendant, by verbal agreement, for a sum above 10*l*. The bargain was for immediate delivery; but plaintiff requested defendant to lend the horse to him, plaintiff, and, by defendant's consent, plaintiff kept the horse. Afterwards defendant refused to take the horse. The jury, on the question being put to them, found that the bargain was complete before the arrangement as to the loan took place.

Held, that there was an acceptance of the horse by defendant within the exception of sect. 17 of the Statute of Frauds (29 C. 2, c. 4).

ACTION for money payable by defendant to plaintiff for horses, mares, and geldings bargained and sold, and sold and delivered, by plaintiff to defendant; and on accounts stated. Plea: Never indebted Issue thereon.

On the trial, before Lord Campbell, C. J., at the last Warwickshire Assizes, it appeared that the action was brought to recover the price of a horse. It was agreed that there had been a complete verbal bargain for the sale of the horse by the plaintiff to the defendant for a price above 10*l*., and that, about a fortnight afterwards, the plaintiff sent the horse to the defendant, who refused to take or pay for him, alleging that the horse had been ill used in the interval. The plaintiff's evidence was that the bargain was complete for immediate delivery; that, after it was complete, the plaintiff asked the defendant to lend him the horse for a few weeks till he got another, to which the defendant agreed if the plaintiff would take care of it; and that in consequence the plaintiff kept the horse from that time, not as vendor, but as borrower of the horse. There was no part payment, nor any memorandum in writing. It was objected that there was no evidence to go to the jury of any acceptance and actual receipt of the horse. The Lord Chief Justice refused to stop the case. The defendant then gave evidence, according to which the original verbal bargain was that the horse should not *be delivered for a month; and the plaintiff retained possession, not as a borrower, but in virtue of the original bargain. The Lord Chief Justice left the question to the jury, Whether the verbal contract for the sale of the horse was complete before there was any agreement about the horse being returned by the plaintiff, and the horse was lent to the plaintiff by the defendant as his owner; or, Whether the retainer of the horse was part of the bargain. The jury found that the contract was complete before the permission to keep the horse was given to the plaintiff, and that the horse was lent by the defendant as his owner. [*727

The Lord Chief Justice then directed a verdict for the plaintiff, with leave to move as after mentioned.

Mellor, in last Term, obtained a rule to show cause why a verdict should not be entered for the defendant, or a nonsuit, "on the ground that there was no evidence of sufficient acceptance of the horse in question, within the 17th section of 29 Car. 2, chap. 4."

Hayes, Serjt., and *Bittleston*, on an earlier day in this Term, showed cause.(*a*)—The finding of the jury is that, after the completion of the contract of sale (when the plaintiff was in possession as unpaid vendor, and the defendant owner of the horse, subject to the vendor's lien, and entitled on paying the price to an immediate delivery), there was an agreement between the two that the horse should thenceforth be kept by the plaintiff, not as unpaid vendor, but as gratuitous bailee of the horse; the defendant assenting to this, as owner of the horse, on the condition that the plaintiff should take *care of it. This responsibility would have arisen from the mere lending, though not expressed; but the expression is important evidence justifying the jury in finding that the defendant meant to lend it as owner. Now, [*728

(*a*) June 4th. Before Lord Campbell, C. J., Coleridge and Erle, Js.

if the defendant had taken manual possession of the horse for one second, and led him by the bridle for one yard, and then given him back to the plaintiff to keep on those terms, it would not be disputable that there was a complete delivery, acceptance, and receipt, changing the character of the plaintiff's possession, and altering the nature of his responsibility. But, when two parties, having the present power to make a delivery of goods, agree to consider it as made, it has in law the same effect as if the goods were taken up and laid down again. It is like settlement in account of two debts, both of which are in law considered paid, though the parties have not gone through the form of handing the money across and receiving it back.(*a*) If the holder of the goods agrees to change the nature of his possession, it is the same thing as if he had made a corporeal delivery to a third person agreeing to hold on those terms. Elmore *v.* Stone, 1 Taunt. 458, proceeds on this principle. In Blenkinsop *v.* Clayton, 7 Taunt. 597 (E. C. L. R. vol. 2), the horse remained in the vendor's possession; but there were facts tending to show that the purchaser had treated it as his own: and the decision was that these facts were evidence to go to the jury of a delivery. In Tempest *v.* Fitzgerald, 3 B. & Ald. 680 (E. C. L. R. vol. 5), and Carter *v.* Toussaint, 5 B. & Ald. 855 (E. C. L. R. vol. 7), the Court held that there was in those cases no evidence that the vendor

*729] had agreed to alter the nature of his possession; but in *both the Court recognised the principle laid down in Elmore *v.* Stone and Blenkinsop *v.* Clayton, that, if the nature of the possession had been changed, it would be sufficient. In Holmes *v.* Hoskins, 9 Exch. 753,† Parke, B., recognises the principle of Elmore *v.* Stone, whilst distinguishing it from the case before him. He says: "in order to satisfy the statute, there must be an acceptance, and an actual or constructive delivery. Now, in this case, there was no actual delivery; and therefore, to entitle the plaintiff to recover, there must be such a dealing with the cattle by the defendant as owner, that the plaintiff would lose his lien. But it is clear that the plaintiff never meant to part with the cattle until the price was paid." "My brother Kinglake relied on Elmore *v.* Stone; but that case is very different from the present; for there, when the vendor assented to the purchaser's request, there was an act of acceptance by which the former lost his lien." In the present case, on the finding of the jury, the vendor had given up his lien; he had completely agreed to hold the horse in a new capacity. The question, upon this evidence, was for the jury; Parker *v.* Wallis, 5 E. & B. 21 (E. C. L. R. vol. 85).

Mellor and *Field* were now heard in support of the rule.—There has been no change of possession equivalent to delivery of the horse. [Lord CAMPBELL, C. J.—Your difficulty arises from the finding of the jury.] Where reliance is placed upon an act, as intended by the parties to be equivalent to delivery, the transaction must be at least unambiguous:

(*a*) See Livingstone *v.* Whiting, 15 Q. B. 722 (E. C. L. R. vol. 69).

it is incorrect to treat the question as one of an act of ownership. In Blenkinsop *v.* Clayton *it was held to be a question for the jury whether the act relied upon (an offer by the vendee to sell the goods as his own) was evidence of a delivery to him; and that case, no doubt, is to a certain extent in favour of the plaintiff. But the other cases cited are distinguishable. In Elmore *v.* Stone the vendor removed the horses from the sale stable into another, upon the request of the vendee that the vendor, who was a livery-stable keeper, would keep the horses at livery for him: that was an unequivocal delivery, as much as if the horses had been sent to the livery-stable of a third party. The marginal note in Tempest *v.* Fitzgerald does not quite accurately represent the facts of the case. The vendee had ridden upon the horse sold; and the jury were told to find for the plaintiff if they thought that such riding was an exercise of ownership, and not merely by way of trial; and they found for the plaintiff. The Court, nevertheless, ordered a new trial: and they pointed out that the bargain was for ready money, so that the vendee had no right to the possession of the horse until he had paid for it, which he had not done; whereas in Blenkinsop *v.* Clayton the contract was not for ready money, but the horse was to be delivered within an hour, before the expiration of which time the act in question took place. Here the plaintiff had not paid for the horse, which brings the case within Tempest *v.* Fitzgerald: the horse could [*730

not be said to have been delivered, because the vendor had done nothing to give up his lien: and this meets the argument suggested here from the finding of the jury. In Howe *v.* Palmer, 3 B. & Ald. 321 (E. C. L. R. vol. 5), twelve bushels out of a quantity of *tares were sold, to remain in the possession of the vendor till called for; and the vendor afterwards measured out the twelve bushels, giving orders to set them apart, and to deliver them to the defendant when he should call for them: and it was held that this was no acceptance. There Bayley, J., said: "In Elmore *v.* Stone, the buyer directed expense to be incurred: and the directing of that expense was considered evidence of an acceptance on his part. That case goes as far as any case ought to go, and I think we ought not to go one step beyond it. There is this distinction between that case and this, that there an expense was incurred on account and by the direction of the buyer: here there is none. But I must say, however, that I doubt the authority of that decision." [Lord CAMPBELL, C. J.—A delivery to the vendee's agent would do, you admit: may not the vendor be such agent?] That would be an evasion of the letter and intent of the statute. In Carter *v.* Toussaint no time was fixed for the price of the payment of the horse: it was to remain with the vendor for twenty days without any charge to the vendee, at the expiration of which time it was, in fact, by the direction of the vendee, sent to grass and entered as the vendee's horse: this was held not to be an acceptance within the statute, Bayley, [*731

J., saying: "There can be no acceptance or actual receipt by the buyer, unless there be a change of possession, and unless the seller divests himself of the possession of the goods, though but for a moment, the property remains in him." [ERLE, J.—Do you say that there must *732] *be a manual receipt? Take the case of bales of cotton lying in a warehouse.] There is a difference between evidence of a delivery and evidence of an acceptance; no act of the vendor can amount to an acceptance by the vendee. In Beaumont *v.* Brengeri, 5 Com. B. 301 (E. C. L. R. vol. 57), where it was held that there was an acceptance, the Judges clearly relied, not on the fact of the carriage being removed to a different part of the warehouse, but upon the vendee having taken it out for a ride. In Holmes *v.* Hoskins the vendee felt in his pocket for his check-book, in order to pay for the cattle sold; but, finding that he had not got it, told the vendor to come in the evening for the money; but the cattle never were paid for; and it was agreed that the cattle should remain in the vendor's field for a few days, and that the vendor should feed them with the vendee's hay, which was done: it was held that there was no evidence to go to the jury of an acceptance to satisfy the statute. [Lord CAMPBELL, C. J.—There the vendor clearly intended to keep his lien.] This case illustrates the danger of allowing supposed equivalents to the conditions prescribed by the statute: the evidence rested on the terms of a conversation which were in dispute, the very evil which the statute was intended to meet. [ERLE, J.—Proof of part payment would be liable to the same objection: the vendee might say, I meant only to lend you the money.] In such a case there is at any rate the substantive fact of the handing over the money.

*733] COLERIDGE, J.—I am of opinion that we ought to *discharge this rule. The question is whether, on the facts found by the jury, the Statute of Frauds is satisfied, and whether there is any evidence for that finding. The Statute of Frauds requires an actual receipt, which implies delivery and acceptance. It is admitted that, if there be an actual visible possession in the vendee for a single moment, that is enough; the question cannot turn on the time. It must also be admitted that it is enough if a third party has such possession for the vendee. It is said that nothing short of that will do; and, as I understand Mr. *Field*, he contends that there must be some positive act, and that, without that, words alone will not satisfy the statute. Here it is found that the bargain was complete; and that, after that, the vendor asked the vendee to lend him the horse for a specific purpose, to which the vendee assented. The vendor retains the apparent possession, but holds for the vendee, unless there be a distinction between this state of things and what is admitted to be sufficient to satisfy the Statute of Frauds. Try, then, how that is. Must there be an actual transfer? The case of Elmore *v.* Stone, 1 Taunt. 458, furnishes an answer to that question; for there there was a removal of the horse from one stable

of the vendor to another stable of the vendor; in the first of these the vendor kept his own horses, in the other the horses belonging to other people: so that the horse still continued in his apparent possession, but the character of the possession was altered. So here there is the same apparent possession throughout, but the evidence shows that its character was changed. Much has been said as to whether the lien here was retained or not: *but it seems to me that this is not material [*734
to the argument, and that the legal result arises only from the preceding part of the transaction. Had the plaintiff retained the horse in the character of an unpaid vendor, there would not have been a delivery: but the verdict negatives that supposition.

ERLE, J.—I also am of opinion that the rule should be discharged. The question is, whether the buyer has accepted the horse, and actually received it. All that passed has been merely by word of mouth: there has been nothing which, according to the language of many cases, amounts to manual delivery. The statute, for many years, was very much praised. I believe that the party who inserted the words had no idea what he meant by "acceptance:" that opinion I found on the everlasting discussion which has gone on, as if possession, according to law, could mean only manual prehension. It may mean that, or it may mean a handing over to a servant; but the question is, whether there has been an exercise of the right inconsistent with any supposition but that of ownership; whether there is an actual sale, and an act which is inconsistent with anything but ownership. When you apply that here, you have the finding of the jury that there was an actual sale, and that the purchaser assumed to be in actual possession. He permitted the other party to retain the horse. All, indeed, passed by word of mouth: but, to my mind, it is a most decisive case of possession, and one in which the vendor had lost his claim to lien.

CROMPTON, J.—I was not present during the whole *of the [*735
argument: but, so far as I can judge from what I have heard, I am of opinion that the rule should be discharged. There is no question as to the identity; there is a sale of the horse, and then what amounted to a loan by the vendee; and, under that loan, the vendor kept possession of the horse. That is a possession by the vendee. The case is analogous to that of goods warehoused. I go to the warehouseman with the seller, and say to him, "you now hold these goods for me:" the warehouseman then becomes the bailee of the purchaser, and the possession of the warehouseman becomes that of the purchaser. Mr. *Mellor* says, and he would succeed if he could make out his proposition, that in no case can the vendor, for this purpose, be the agent for the vendee; but that, I think, is not law. Elmore *v.* Stone, 1 Taunt. 458, shows that: in the one case we have a bailment of a description different from the original possession; here we have a loan; but in each case the possession of the bailee is the possession of the bailor; it

would be dangerous to distinguish between such cases. In Carter v. Toussaint, 5 B. & Ald. 855 (E. C. L. R. vol. 7), the Court distinguished the case on the ground that the plaintiff's character as owner remained unchanged; and that is the question of fact here: did the vendor hold the horse as agent of the vendee? I think it is clear that he did, unless we are to say that no verbal arrangement can create that state of things. At one time it used to be thought that no verbal evidence could be let in to show the fact of payment: but that is clearly not the law; nor is there any such law in the case of acceptance. I think the verdict was right.

*736] *Lord CAMPBELL, C. J.—I agree with the rest of the Court. While the Statute of Frauds remains, we are bound to give effect to it, and shall do so; but we are doing so here. There has been an acceptance and a receipt of the chattel, on the finding of the jury, which is quite justified by the evidence. The vendor became bailee of the horse, and held by the authority of the vendee. The case is, therefore, within the exception of sect. 17. I must say that, giving as I do full effect to the statute while it remains, I shall rejoice when it is gone. In my opinion it does much more harm than good. It promotes fraud rather than prevents it, and introduces distinctions which, I must confess, are not productive of justice. Rule discharged.

FRANCIS TANTUM HOWITT *v.* STEPHEN MANFULL.

June 30.

A Local Board of Health constituted under an order in council consisted of nine members, one-third of the persons first elected to go out of office on 31st March, 1855. Before that day three of the persons first elected ceased to be members, by reason of non-attendance.

The Local Board selected those three to go out of office; and on 31st March three new members only were elected, Held (under sects. 13, 18 of The Public Health Act, 1848, 11 & 12 Vict. c. 63), that the Board, consisting of the six members first elected, and the three new members, was well constituted.

REPLEVIN. A case was, by order of a Judge, stated for the opinion of the Court, without any pleadings, of which the substance was as follows.

By an order of Her Majesty in council, made, on the 8th day of June, 1854, under and by virtue of the provisions of The Public Health Act, 1848 (11 & 12 Vict. c. 63), it was ordered that the provisions of

*737] the said *Act should be applied to the district of Heavor, in the county of Derby. The Local Board of Health for the said district was ordered to consist of nine members: and at the first election of members of the said Local Board, held on the 21st day of July, 1854, nine persons named in the case were duly elected members of the Local Board, and took upon themselves the duties thereof. Under the

provisions of the Act, and in and by the order in council, it was directed that one-third in number of the members of the said Local Board should go out of office on the 31st day of March in each year, subsequently to that in which the said first election of members of the said Board took place. John Ray and Joseph Smallwood, two of the persons elected members of the Local Board at the election held on the 21st day of July, 1854, were, during three successive calendar months next preceding the 4th day of January, 1855, absent from all meetings and committees of the said Local Board. And William Soar, another of the said persons, on the said 4th day of January, 1855, began to absent himself from the meeting of the said Local Board, and was, during more than three successive calendar months, next preceding the 31st day of March, 1855, absent from all meetings and committees of the said Local Board. On the 4th day of January, 1855, the Local Board declared that the said John Ray, Joseph Smallwood, and William Soar should be the one-third in number of the members of the said Local Board who should go out of office on the said 31st day of March, 1855: and a minute was thereupon entered, by direction of the said Local Board, in the minute book of proceedings of the said Board in the following words: "John Ray, Esquire, and Mr. Joseph Smallwood, having become *disqualified, in pursuance of the provisions of section 18 of the Public Health Act, 1848, by reason of non- [*738 attendance for three successive months: it was ordered that they and Mr. William Soar shall be the one-third in number of this Board who shall go out of office on the 31st day of March in this year, pursuant to the provisions of Her Majesty's order in council." None of the six other persons, who, together with the said John Ray, Joseph Smallwood, and William Soar, had been elected on the 21st day of July, 1854, went out of office on the said 31st day of March, 1855; and at the election held on that day three persons only were elected, viz., George Jessop, Edward White, and the said John Ray, who was re-elected. The said Edward White never qualified himself to act, and never did act as a member of the said Board. On the 5th day of July, 1855, an assessment for a general district rate was made by the said Local Board, under the hands of five members, and under the seal of the Local Board.

The plaintiff, Howitt, was an occupier within the district, and a person liable by law to be assessed to the said rate, and was in due form of law rated and assessed in such rate, in the sum of 3*l.* 16*s.* 11*d.* It was admitted that payment of the amount of the rate was, on the 5th day of September, 1855, duly demanded in writing of Howitt, and he did not pay it. Howitt, at the time of the said demand on him, objected to pay the rate, and still objects to pay the same, on the grounds that some one or more of the five persons, by whom the said rate was so made and signed as aforesaid, ought to have gone out of office on

the said 31st day of March, 1855, and were not, at the time the said rate was made, legally members of the said Local Board. A warrant
*739] of distress *has been issued, in pursuance of the provisions of the said Public Health Act, for enforcing payment of the said rate; and certain goods of Howitt have been seized by the defendant under the said warrant, and since replevied by the sheriff of Derbyshire, at the instance of Howitt.

The question for the opinion of the Court is, Whether, upon the facts above stated, the said rate is a valid rate under the provisions of the Public Health Act 1848, or any of them, and can legally be enforced? If the Court shall be of opinion that the said rate is a valid rate and can legally be enforced, it is agreed that the plaintiff shall pay to the defendant the sum of 4*l.* 0*s.* 8*d.*, the amount of the said rate, and the costs of procuring the warrant of distress and the costs of the action.

And, if the Court shall be of opinion that the said rate is not a valid rate and cannot legally be enforced, it is agreed that the defendant shall pay to the plaintiff the sum of 4*l.* 4*s.*, and the costs of the action.

Crouch, for the plaintiff.—The question turns upon the construction of sect. 13 of The Public Health Act, 1848 (11 & 12 Vict. c. 63). That section, after providing that the number of persons to constitute the Local Board of Health in each district shall be determined by the order in council, or by Parliament, proceeds: "And the first election for any district or part of a district shall take place on a day to be appointed by order of Her Majesty in council, or by Parliament (as the case may require); and one-third of the number elected for the whole or any part or parts of a district respectively shall go out of office on such day in each year subsequently to that of the first election as shall be appointed
*740] by such order in *council or provisional order as aforesaid (as the case may require); and the order in which the persons first elected shall go out of office shall be regulated by each Local Board: Provided always, that if the number of persons to be elected be not divisible by three, the proportion to go out of office in each year shall be regulated by such order in council or provisional order (as the case may require), so that, as nearly as may be, one-third shall go out of office in each year; and if the number of persons to be elected for any part of a district be less than three the persons elected shall go out of office on such day in each year, or at such other period not being less than a year, as such order in council or provisional order (as the case may require) shall direct; but no person elected shall in any case continuously remain in office for more than three years; And on the days appointed for going out of office a number of persons shall be elected equal to the number of those so going out, and so many others as may be necessary to complete the full number of the Local Board of Health in respect of which the election is to be made." By sect. 18, any member, who during three successive months is absent from all meet-

ings and committees of the Local Board of Health, "shall be deemed to have refused to act, and shall cease to be a member of such Local Board, and his office as such shall thereupon become vacant." In this case Ray and Smallwood had, on the 4th day of January, 1855, already ceased to be in office as members of the Local Board, when they were selected to go out of office in March. [Lord CAMPBELL, C. J.—If six of the members had died, so that only three remained, do you say that the surviving three must all go out of office, and an entirely new Board be elected?] The argument *must go to that extent. The words [*741 of the Act are, that one-third of those first elected shall go out of office. The object was to secure a change. [ERLE, J.—The Legislature intended that there should be a change as to one-third, but that two-thirds should be old members. It is practically important that a body transacting business should not consist entirely of novices. As it is, the three new members have been elected.]

Bovill and *Boden*, for the defendant, were not called upon to argue.

Lord CAMPBELL, C. J.—It is not necessary to inquire whether the validity of the rate can be called in question on account of the constitution of the Local Board who made it; for it seems to me that this Local Board was well constituted. There were three vacancies on the day appointed; and it seems unnecessary for the Local Board to require more members to go out of office on that day, in order to give that opportunity which the Legislature intended of electing three new members. It is much better to adopt this construction, than to lay down a rule which might operate so as to compel a complete change in the whole body, to the manifest detriment of its efficiency.

COLERIDGE, J.—I am of the same opinion. It is difficult to give effect literally to every word in this Act; but the general principle is clearly what is stated by my Lord.

ERLE, J., and CROMPTON, J., concurred.

Judgment for the defendant.

---

*JOSEPH JAVIER DE LIZARDI *v.* WILLIAM PENNELL and Others, Assignees of WILLIAM CLOSE CURRIE, a Bankrupt. *June* 6. [*742

L. & Co., a London firm, agreed with C. & Co., also a London firm, to make advances on a cargo per S., consigned to M. & Co., at Moulmein; on the terms that L. & Co. should have a lien on the cargo and its proceeds; and that M. & Co. should remit the proceeds as soon as realized through L. & Co. L. & Co. accordingly advanced to C. & Co. 6000*l*. M. & Co. were informed of the arrangement and agreed to it. Afterwards L. & Co. requested C. & Co. to pay off their advances. C. & Co. informed M. & Co. of this, and requested them to draw on them in favour of L. & Co. in anticipation. L. & Co. were not aware of this application. M. & Co. wrote to C. & Co., expressing dislike to the style of draft, but assenting to do as requested, and adding, in a letter of the same date, "we trust you will take care we are protected in this matter." Enclosed was a letter, addressed to L. & Co. unsealed, advising them of a draft. The draft

was on C. & Co., payable six months after sight to L. & Co. C. & Co. accepted the draft, handed it and the letter to L. & Co., and afterwards duly honoured the draft. Afterwards a similar draft was sent in a similar letter, stating the draft to be "in anticipation of the arrival of the S.," addressed to L. & Co., but open, and in a letter to C. & Co. When it arrived, C. & Co. were in such circumstances as to be aware that they could not honour it. They therefore suppressed both letter and draft; M. & Co. approved of their conduct. Subsequently C. & Co. became bankrupts; and the unaccepted draft came into the hands of his assignees. L. & C., whose advances had not been paid off, demanded the draft from them, and, on its being refused, brought trover. On a special case stating the above facts:

Held, that L. & Co. had no property in the draft, which had not been drawn under the agreement to which they were a party, but under a separate arrangement between C. & Co. and M. & Co.; and that, under the arrangement between C. & Co. and M. & Co., the former would have done wrong if they had handed over the draft to L. & Co. when aware that they could not protect it.

TROVER for two bills of exchange. Pleas: Not Guilty; and That the bills were not the property of the plaintiff. Issues thereon.

On the trial, before Wightman, J., at the last Summer Assizes for the county of Surrey, a verdict was taken for the plaintiff, subject to a case, the material parts of which were as follows:—

The plaintiff is a merchant in London, trading under the style or firm of F. de Lizardi & Co.; and J. F. Bacon acted as the manager of his business. The defendants are the assignees of W. C. Currie, a bankrupt, who, prior and up to the time of his bankruptcy, carried on business in London, as a merchant, under the style or firm of Currie, Dale & Co. In the month of May, 1852, *Currie, Dale & Co. contemplated making shipments to Calcutta; and F. de Lizardi & Co. agreed to assist Currie, Dale & Co. by advances. The terms of such agreement were embodied in the following letter by the plaintiff. "W. C. Currie, Esq., Moorgate Street, London, 10th May, 1852. Dear Sir,—We are in possession of your favour of the 6th instant, the contents of which relate to the proposed business operations with Calcutta. The conditions, as detailed in your said favour, are substantially the same as mentioned in the conversation held with you previously. We have some modifications to propose, and therefore proceed to detail the terms on which we are disposed to take up the business. 1. A general guarantee for the whole amount to be given us by the approved party. 2. Our advances to be made at six or more months' date; the amount to be drawn upon us the first year not to exceed 30,000*l.*, and the amount running upon us at any time not to exceed 20,000*l.* 3. Whenever our cash advances upon your account shall exceed 5000*l.*, either yourself or the party guarantying are to place us in funds for the excess, on our notifying the same to them. 4. Each shipment to be numbered consecutively, and to be settled for separately within the period of sixteen months from the date of shipment. 5. The bills drawn upon us, under this agreement, to be drawn by your constituents in Glasgow, or Manchester, against shipments of merchandise made to the consignments of your friends, Messrs. Norman, Brothers & Co., of Calcutta, who are to give us an undertaking that they will account

*743]

for and remit us the net proceeds of such shipments, to the extent of our advances, charges, and commission. 6. The bills of lading to be either made to our order or endorsed over to us; and by us they *will be endorsed in favour of, and handed over to, Messrs. Norman, Brothers & Co., who are to give us in exchange the undertaking mentioned in article 5. 7. Insurance upon each shipment is to be made free of commission. 8. We shall furnish you with an account every six months, charging interest at the rate of 5 per cent., and commission of 1 per cent. on the amount drawn, with an extra charge of 1 per cent. additional on such amount as may be in cash advance. 9. Remittances to be made us by the parties in Calcutta, either in bills of exchange or produce. When the latter plan is adopted we are to have the disposal thereof, charging sale commission of 1½ on the gross proceeds. 10. Should you require any credits for parties in China, we are prepared to give them in consideration of a commission of 1½ on the usual conditions, i. e., that the bills be at six months' sight, and that they may be accompanied by shipping documents. It is also understood that the business is for the present to be carried on by Mr. Dale on your behalf, until such time as your connexion with the present house of Messrs. Cooper, Currie & Petre be terminated: and, as it is difficult to fix a period for the conclusion of the operations which may arise out of this agreement, either party can retire on giving notice to the other of his wish to do so. We hope this agreement may be the prelude to a large and beneficial business, and assure you that we will give our best attention to obtain that end. We remain, Dear Sir, Yours faithfully, F. DE LIZARDI & Co." [*744

In pursuance of the agreement, David Scott & Co., of Manchester, sent a letter of guarantee to F. de Lizardi & Co. It was afterwards agreed, between F. de Lizardi & Co. and Currie, that the commercial operation, the *subject of the first-mentioned agreement, should not be confined to Calcutta, but should be extended to Shanghai in China, and other ports to be afterwards determined upon, and that the terms of the first-mentioned agreement should be applicable to such extended arrangement. David Scott & Co. were parties to this extension of the original agreement, and wrote the following letter. "F. de Lizardi & Co. Manchester, 23d June, 1852. Gentlemen, With reference to our letter of guarantee of the 21st ult., in favour of Mr. W. C. Currie, we now beg to say that, if agreeable to you, we wish the guarantee to extend to Shanghai, and other ports that may afterwards be determined upon, as well as Calcutta. We remain, Gentlemen, Yours faithfully, DAVID SCOTT & Co." From June, 1852, until August, 1853, various shipments were made by Currie, Dale & Co., in pursuance of the last-mentioned agreement. In August, 1853, Currie, Dale & Co. made shipments, by a vessel called "The Scandia," to Moulmein, in the Burmese empire, such shipments being consigned to Messrs. Macrae, [*745

Begbie & Co., the correspondents of Currie, Dale & Co. at Moulmein. About the time of the sailing of the vessel, and between the 8th and the 24th of August, 1853, the plaintiff advanced to Currie, Dale & Co., upon such last-mentioned shipments, the sum of 6000*l.* The plaintiff sent letters to Macrae, Begbie & Co., containing the following passages in reference to the shipments per Scandia. 8th August, 1853. "From Messrs. Guthrie & Co., of Singapore, we have received a remittance, on your account, of 594*l.* 9*s.* 11*d.*, which we understand is to be placed to the credit of our common friends Messrs. Currie, Dale & Co., whom we have advised accordingly. We learn that said friends are making
*746] some large shipments *to your care in the Scandia, on which we shall make advances as heretofore; for other particulars we must refer to letters of said friends and our next advices." "London, 24th August, 1853. Messrs. Macrae, Begbie & Co., Moulmein. Our mutual friends Messrs. Currie, Dale & Co. will, no doubt, advise you of the large shipments they have made to your consignment on the Scandia. We have effected insurance thereon for upwards of 11,000*l.* sterling, and have accepted sundry valuations against the same to the extent of 6000*l.*; but, as our advances on this shipment will be to a greater extent, we reserve ourselves to give you a detailed statement of our advances and charges by another opportunity. Meanwhile you will please to take note, Gentlemen, that we have a general lien upon the cargo per Scandia, shipped by Messrs. Currie, Dale & Co., to the amount of our advances, with the contingent charges." (Signed) F. de Lizardi & Co. The plaintiff did not, in fact, make any advances on the shipments per Scandia beyond 6000*l.*: and, about a month after the date of the last letter, the plaintiff gave notice to W. C. Currie that he did not intend making him any further advances. Whereupon, on the 23d of September, 1853, Currie, Dale & Co. wrote a letter to Macrae, Begbie & Co., which, so far as it relates to the matters in question, was as follows. "We regret to say that, in consequence of the warlike state of affairs, and the increasing tightness of the money market, Messrs. F. de Lizardi & Co. have come to the determination to draw in their horns, and have consequently given us a notice that they do not intend to accept any more drafts for us, and wished their accounts closed as speedily as possible; and you will therefore be pleased to send them their remittances
*747] as speedily as *you can: and you may therefore draw upon us for 1000*l.*, every mail, in their favour, at six months' sight, and remit us the proceeds of sales to meet those drafts as they fall due." Before Macrae, Begbie & Co. received the letter, they wrote the following letter to F. de Lizardi & Co. "Moulmein, October 17th, 1853. Dear Sirs. We are in receipt of your favour of the 24th August, and observe the large shipments made by our mutual friends; and we note your remarks and wishes, and accordingly shall hold the proceeds subject to yourselves. We enclose draft on Messrs. Currie, Dale & Co., favour of yourselves, for

1200*l*., as collateral security bills of lading for 250 tons teak timber per William Frederick, with order for insurance attached, which amount place to credit of the above friends' account, as we shall henceforth remit you as regularly as we possibly can, irrespective of any particular account or balance whatever. The prospect of our coming rice season is good; and we look for a larger supply than usual. Teak timber, last season's wood, is getting very scarce; and large prices are demanded for it. Dear Sirs, Yours faithfully, MACRAE, BEGBIE & Co." Macrae, Begbie & Co. wrote letters to Currie, Dale & Co., which, so far as regards the matter in question, were as follows. "Moulmein, 17th November, 1853. We have now before us your esteemed favour of 23d September, No. 48 and 49, and duly note their contents. We observe, with very great regret, that Lizardi & Co. had requested their account to be closed, and only hope that such will not much inconvenience you, and that next mail will bring word of your having obtained others to grant you the same useful accommodation, as also a credit for us on some bank as urged in our letter to Mr. Macrae." Moulmein, 17th December, [*748 *1853. "Lizardi & Co. We note your wishes regarding remittances to them, and under separate cover advise drafts in their favour. We must, however, say we dislike this style of draft, and would rather not have done so." This last letter was accompanied by another from Macrae, Begbie & Co. to Currie, Dale & Co., in the following words. "Moulmein, 17th December, 1853. Via Marseilles. Messrs. Currie, Dale & Co., London. Dear Sirs, We enclose our letter to Messrs. Lizardi & Co., handing them, as requested by you, 2000*l*. We trust you will take care we are protected in this matter. Dear Sirs, Yours faithfully, MACRAE, BEGBIE & Co." Enclosed in this last letter was a letter addressed to Messrs. F. de Lizardi & Co., folded up, but unsealed and unfastened, containing a draft, drawn by Macrae, Begbie & Co. upon Currie, Dale & Co., for 2000*l*., and made payable, six months after sight, to the order of Messrs. F. de Lizardi & Co. This draft was, upon its arrival here, accepted by Currie, Dale & Co., handed over to F. de Lizardi & Co., and duly honoured and paid at maturity. On the 31st December, 1853, Macrae, Begbie & Co. sent a letter to Currie, Dale & Co., enclosing a letter addressed to F. de Lizardi & Co. The letter addressed to Currie, Dale & Co. referred to the letter in these words. "Moulmein, 31st December, 1853. Via Marseilles. Messrs. Currie, Dale & Co., London. Dear Sirs, We have valued upon you this mail as follows, viz., No. 90. For ourselves Marian 315*l*. 18*s*. 5*d*. No. 91. For Crawley & Martin 100*l*. No. 92. For F. de Lizardi & Co. 1500*l*. No. 93. For ourselves account W. J. Girl 1000*l*., which kindly protect. We enclose letter to Messrs. Lizardi & Co., and Crawley & Martin. Yours faithfully, MACRAE, BEGBIE & Co." The letter enclosed, addressed to F. de Lizardi *& Co., was as follows. [*749 "Moulmein, 31st December, 1853. Messrs. F. de Lizardi & Co.,

London. Dear Sirs, We beg to enclose you our draft at six months, No. 92, for yourselves, on our mutual friends Messrs. Currie, Dale & Co., for 1500*l.*, in anticipation of the arrival of the Scandia, and which amount we trust will prove in order. Dear Sirs, Faithfully yours, MACRAE, BEGBIE & Co." This last-mentioned letter was folded up, but unsealed and unfastened, and the draft enclosed therein was drawn by Macrae, Begbie & Co., on Messrs. Currie, Dale & Co., for 1500*l.*, and payable to the order of Messrs. F. de Lizardi & Co. This last-mentioned draft was duly accepted by Currie, Dale & Co., handed over to F. de Lizardi & Co., and duly honoured at maturity. On the 17th January, 1854, Macrae, Begbie & Co. wrote a letter to Currie, Dale & Co. in the following terms. "No. 52. Moulmein, 17th January, 1854. Dear Sirs. We beg to advise the following drafts, which kindly protect. No. 94. For Messrs. Rickmarsten & Co., thirty days' sight, 23*l.* 5*s.* No. 95. D. Duff, Esq., 100*l.* No. 96. F. de Lizardi & Co., six months' sight, 1000*l.* No. 98. J. M. Richardson, Esq., thirty days' sight, 12*l.* No. 99. H. S. Austin, 15*l.* No. 100. Selves account, Wild Irish Girl, six months' sight, 1850*l.* No. 101——, thirty days' sight, 148*l.* 18*s.* 7*d.* We enclose Auras's original charter-party, endorsed by Captain Mattison, for 148*l.* 18*s.* 7*d.*, which amount, as in draft 101, pass to credit of our account. Also Lieutenant Mackintosh on J. Wilkinson, thirty days' sight, for 50*l.* Captain Potts on his owners 126*l.* 11*s.* 6*d.*, with letter of advice attached; also pass to our credit. We told you we had sent Messrs. Lyall & Co. the former draft for 708*l.* 12*s.* 4*d.*, and requested them, if they had difficulty, to communicate with your good selves. Dear *Sirs, Yours faithfully, MA-

*750] CRAE, BEGBIE & Co." Enclosed in this last-mentioned letter, was a letter addressed to Messrs. F. de Lizardi & Co., folded up, but unsealed and unfastened, and in the following terms. "Moulmein, 16th January, 1854. Messrs. F. de Lizardi & Co., London. Dear Sirs, Enclosed we beg to hand you our draft on Messrs. Currie, Dale & Co. for 1000*l.*, which place to account shipment per Scandia. And oblige Yours faithfully, MACRAE, BEGBIE & Co." The last-mentioned letter contained a draft drawn by Macrae, Begbie & Co., upon Currie, Dale & Co., for 1000*l.*, payable, six months after sight, to the order of F. de Lizardi & Co. It is one of the bills the subject of this action. On the 30th January 1854, Macrae, Begbie & Co. wrote the following letter, addressed to F. de Lizardi & Co., which last-mentioned letter was enclosed in a letter addressed by Macrae, Begbie & Co. to Currie, Dale & Co. "Moulmein, January 30th, 1854. Messrs. F. de Lizardi & Co., London. Dear Sirs, This serves to hand you draft at six months' sight, on our mutual friends, for 1500*l.*, against advance per Scandia. Yours faithfully, Macrae, Begbie &. Co." The last-mentioned letter was folded up, but unsealed and unfastened; and it contained a draft drawn by Macrae, Begbie & Co. upon Currie, Dale & Co., for 1500*l.*,

payable, six months after sight, to the order of F. de Lizardi & Co., being the other bill the subject of this action. The letters of the 16th January, 1854, and the 30th January, 1854, respectively, with the drafts therein contained, came to the hands of W. C. Currie, on or about the 17th March, 1854. He did not forward the said letters of the 16th January, 1854, and 30th January, 1854, addressed to the plaintiff by Macrae, Begbie & Co., or either of them, to the plaintiff; nor did *he accept the drafts, or either of them, or forward or deliver the same, or either of them, to the plaintiff; nor was the plaintiff [*751 aware of their having arrived, until as hereinafter mentioned. At the time when the said bills arrived in England, the said W. C. Currie was so circumstanced that he had no anticipation of being able to meet the said bills, or either of them, had he accepted the same. In the ordinary course the Scandia would have arrived at Moulmein about the middle of January, 1854: but it is not known when she actually did arrive; nor does it appear that any part of her cargo was sold, nor, if sold, when it was sold. The proceeds of the said cargo had not been realized, previously to her arrival at Moulmein, by sale of the bills of lading. On the 28th August, 1854, the balance of account, then due from Currie, Dale & Co. to the plaintiff, was 4262*l.* 14*s.* 1*d.*: and, in that month, the plaintiff through his managing clerk, Mr. J. F. Bacon, called upon Currie, Dale & Co. to close the account between them and the plaintiff, and to pay the plaintiff the balance. He was unable to do so, but gave some drafts, by David Scott & Co., on account of it. Bacon, upon receiving such drafts, expressly reserved the rights of the plaintiff in respect of the goods shipped by the Scandia, and the produce thereof. Before the said last-mentioned drafts, or any of them, had arrived at maturity, David Scott & Co., and Currie, Dale & Co., had both suspended their payments. The drafts drawn by David Scott & Co., and accepted by Currie, Dale & Co., were dishonoured at maturity, but have since been proved in bankruptcy, by the plaintiff, against the estate of Currie, Dale & Co. Between the month of March, 1854, and the said month of August, 1854, J. F. Bacon was repeatedly in *communication with W. C. Currie, and inquired of him why [*752 he did not send the remittances from Moulmein, and why such remittances were not forthcoming: and W. C. Currie, in answer to such inquiries, said that such remittances would, no doubt, soon arrive, or words to that effect, but did not, upon such inquiry being made, communicate to the plaintiff, or to Bacon, the receipt of the letters of the 16th January, 1854, and 30th January, 1854, with the drafts mentioned therein, until as hereinafter mentioned. On the 25th day of September, 1854, F. de Lizardi & Co. wrote to Macrae, Begbie & Co. "London, 25th September, 1854. Messrs. Macrae, Begbie & Co., Moulmein. Gentlemen, We had last this pleasure on the 8th March, and are since deprived of your esteemed advices, although we had fully counted on

hearing from you with remittances against our advances to our mutual friends Messrs. Currie, Dale & Co., on their shipment per Scandia to your care. In the absence of any remittance from you to cover our advances on said shipments, we have been obliged to take up Messrs. D. Scott, Richmond & Co.'s bills on Currie, Dale & Co., which bills will now, most likely, not be paid, both drawers and acceptors having failed. We have now to beg reference to our letters of the 24th August, the receipt whereof was acknowledged by you in yours of the 17th October, therein as stated your complete acquiescence in the notice given in our letter of the 24th August, that we held a general lien on the cargo per Scandia, shipped by Messrs. Currie, Dale & Co., to the extent of our advances with the contingent charges. Acting thereon, we have to notify to you that the amount due to us, by Messrs. Currie, Dale & Co., *753] for uncovered advances on said shipment per Scandia, in round *numbers about 4100*l.*, that we request you will send us, by return of post, a statement showing what part of the goods per Scandia are sold, and what in hand; also a statement showing how the proceeds of the goods sold have been disposed of: and, Gentlemen, you will please take notice it is our just right and due that the whole proceeds of the shipment by the Scandia be remitted to us till our claims be fully covered, which be so good as to comply with as early as possible. We remain, Gentlemen, your obedient servants, F. DE LIZARDI & Co." This letter remained unanswered when this action was commenced. At the time of the trial it was not known whether the proceeds of any part of the cargo of the Scandia had been realized: but the plaintiff had received no such proceeds; and the unpaid balance of his advances on the Scandia is still 2500*l.*

In the month of April, 1854, Mr. Begbie, of the firm of Macrae, Begbie & Co., arrived in England, and then had a conversation with W. C. Currie, in the course of which Begbie was informed by Currie that he had not given up to the plaintiff the two bills for 1000*l.* and 1500*l.* respectively; whereupon Begbie told Currie that he had done quite right.

The case then stated that the plaintiff became aware of the existence of the drafts in question; that the estate of Currie, Dale & Co. was being wound up under inspection, and Bacon, being one of the inspectors, obtained possession of the drafts and sent them by a notary to be presented for acceptance to Currie, who refused to accept them, and retained them, until afterwards he became bankrupt: and on his bank- *754] ruptcy the drafts came into the hands of the assignees, the *defendants; and that the plaintiff demanded them, and the defendants refused to give them.

The question for the opinion of the Court is, Whether the said plaintiff is entitled to recover from the defendants the said drafts or bills, or either of them, or any damages in respect of the conversion

thereof, or for plaintiff being wrongfully deprived of the use and possession thereof.

If the Court should be of opinion that the plaintiff is entitled as against the defendant to recover the said bills of exchange dated the 16th January, 1854, and 30th January, 1854, for 1000*l.* and 1500*l.* respectively, or either of them, or any damages for the conversion, the verdict taken for the plaintiff to stand; and the Court at its discretion, to direct the bills, or either of them, to be delivered to the plaintiff, or that the defendants should pay to the plaintiff such damages as the Court shall think proper.

If the Court should be of opinion that the plaintiff is not entitled, as against the defendants, to recover the said bills or either of them, or any damages as aforesaid, the verdict is to be entered for the defendant.

The case was now (*a*) argued.

Bovill, for the plaintiff.—The letter of 10th May, 1852, defines the terms on which F. de Lizardi & Co. were to make advances against consignments to Calcutta. By these F. de Lizardi & Co. were to have a lien for their advances on the proceeds, which were to be remitted by the consignees through them. Afterwards *these terms were [*755 extended to other places; and the Scandia was consigned to Macrae, Begbie & Co. at Moulmein on those terms. F. de Lizardi & Co., by their letter of 24th August, 1853, notified to the Moulmein house that they had such a lien; and the Moulmein house, by the letter of October 17, 1853, agreed to those terms, and informed F. de Lizardi & Co. that "we note your remarks and wishes, and accordingly shall hold the proceeds subject to yourselves." This arrangement by the three parties was complete and binding both in law and in equity, and gave the plaintiff a right to the proceeds of the cargo of the Scandia prior to that of Currie, Dale & Co., or their assignees. The proceeds are turned into a draft, which is remitted, payable to F. de Lizardi & Co. It does not come to their actual possession: but it is their property as completely as if it had; Ex parte Mackey in re Morrison, 2 Mont. D. & De Gex, 136. [CROMPTON, J.—It will probably not be disputed that a trilateral mercantile agreement of this sort made between the consignor obtaining advances, the consignee, and the party making advances, is effectual both at law and in equity to bind the proceeds of the consignment. But there seems a difficulty in saying these drafts are the proceeds of the consignment of the Scandia. The Moulmein house were not bound to remit before the proceeds were realized.] They were not bound to do so; but they adopt that course. They send, in advance of the proceeds, two drafts for 3500*l.*, which were handed to F. de Lizardi & Co. It will hardly be disputed that those drafts were the property of the plaintiff, and that, if not duly honoured,

(*a*) Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, Js.

*756] he might have sued upon them. The *two others, the subject of this action, are sent in the same way; but Currie wrongfully withholds them. He had no more right to do so than the post-office would have had; and his wrongful act cannot alter the rights of the parties. Even the Moulmein house themselves could not alter the destination of the drafts, after they had come to Currie's hands; Hodgson *v.* Anderson, 3 B. & C. 842 (E. C. L. R. vol. 10), Walker *v.* Rostron, 9 M. & W. 411,† Yates *v.* Hoppe, 9 Com. B. 541 (E. C. L. R. vol. 67).

Wilde, contrà.—It is not disputed that the plaintiff will have a lien on the proceeds of the consignment of the Scandia, when they are realized, as against the assignees; nor that, if the bills in question had been drawn in pursuance of an arrangement between the three parties, so as to represent those proceeds, they would have been the property of F. de Lizardi & Co. But, when the facts are looked at, it will be found that the bills were not so drawn. The three firms were parties to an agreement by which, so soon as the Moulmein house received the proceeds of the Scandia, they were to remit them to F. de Lizardi & Co., who were first to pay off their own advances, and then to account for the surplus to Currie, Dale & Co. Then on 23d September, 1853, Currie, Dale & Co. request the Moulmein house, for their accommodation, to draw on them, in advance, 1000*l.* a month in favour of F. de Lizardi & Co. This was in substance asking the Moulmein house to make the advances instead of F. de Lizardi & Co. If F. de Lizardi & Co. had been parties to any arrangement of this sort, they would *757] have run some risk of endangering their lien upon the Scandia; but they were *in fact altogether ignorant of the proposal. Then the Moulmein house, knowing that, if their drafts drawn in this way against property not in England were not honoured, they must be returned upon them, with all the expenses of re-exchange, as they themselves say, "dislike this style of draft;" but they appear to have had what turns out to be well founded confidence in Currie's personal integrity, and do send him the drafts, expressly saying that they trust to his seeing that they are protected in the matter. In every case they send the draft, not to F. de Lizardi & Co., but to Currie, Dale & Co. in an unsealed letter, with the intention that Currie may hand it over if he sees that they are to be protected, but not otherwise. The first two drafts Currie accepts and honours. When the letter of 16th January enclosing the draft for 1000*l.* arrived, Currie was aware that he could not honour it. He knew that if he handed over the draft to F. de Lizardi & Co. it must go back as a dishonoured bill, and that his correspondents who had drawn this draft for his accommodation, stipulating that he should see them protected, would have to pay all the heavy charges of re-exchange; and he therefore did not hand over the letter and draft. Begbie, one of the partners in the Moulmein house, when he heard of it in April, 1854, said he was quite right; so that if

a ratification was necessary there is one. The facts as to the other draft for 1500*l.* are precisely similar. In September, 1844, after the Moulmein house, and Currie, the only persons cognisant of the existence of the drafts, had concurred in suppressing them, F. de Lizardi & Co. wrote a letter showing their total ignorance of the whole affair. The situation of that firm had not been in any way altered by what had taken place. If they had been *parties to an antecedent agreement by which this draft was to be remitted on their account, or [*758 if after the draft came into Currie's hands he had attorned, as it were, to them, and they had taken his attornment, the cases cited might have applied; but the facts show that the draft was sent to Currie to accept and hand to F. de Lizardi & Co., if he thought fit, in confidence that he would not do so unless he expected to be able to honour it. Till that authority was acted upon it was revocable; Brind *v.* Hampshire, 1 M. & W. 365.† The principle is precisely the same as that of Williams *v.* Everett, 14 East, 582.

Bovill was heard in reply. *Cur. adv. vult.*

Lord CAMPBELL, C. J., on a subsequent day (June 11), delivered judgment.

We are of opinion that the property in the bills of exchange, for the conversion of which this action is brought, never vested in the plaintiff. Both bills were payable to his order; but no act was ever done by Macrae & Co., the drawers, or under their authority, to give him any title to them which will support this action.

We should have thought otherwise if the bills had been drawn under the original agreement between the parties, or if they had been remitted by Macrae & Co. to the plaintiff, or had been absolutely destined for his use, although remitted through the medium of Currie. But it is quite clear that the bills were not drawn under the original agreement, by which the plaintiff was to be repaid his advances to Currie, by remittances to arise *from the sale of the shipments in India, [*759 either in bills of exchange or produce. In September, 1853, in consequence of the plaintiff refusing to make any further advances to Currie, a new course of dealing originated; and then Currie authorized Macrae & Co., without reference to the proceeds of the shipments or the state of their account with him, to draw upon him for 1000*l.* every mail in favour of the plaintiff at six months' sight, and requested them to remit to him (Currie) the proceeds of sales to meet those drafts as they should fall due. The plaintiff was no party to this new arrangement, and never became privy to it. He retained all his rights under the original agreement; and, accordingly, it is admitted that he is entitled to the proceeds of the shipment by the Scandia, in respect of which the balance is still due to him from the estate of the bankrupt. But the new arrangement was exclusively between Macrae & Co. and Currie for repaying as speedily as possible the advances which the plaintiff had

made. The plaintiff had no right to insist on these bills being drawn by Macrae & Co., or accepted by Currie; and he could only require that his advances should be repaid by the course of dealing originally stipulated for.

This new course of dealing being an arrangement exclusively between Macrae & Co. and Currie, at what moment can it be said that the property in the two bills vested in the plaintiff? They were not sent to him directly; and (as it appears quite clear to us) there was no intention on the part of Macrae & Co. that the bills should at all events be handed over by Currie to the plaintiff. Unless Currie, when the bills arrived in London, should be in a situation to accept and to pay them, we think that Currie ought not to have handed them over *760] *to the plaintiff, but to have left the plaintiff under the original agreement to be reimbursed by the proceeds of the shipment by the Scandia when they should be remitted. If Currie, when he received the bills, should hand them over to the plaintiff, although they must be dishonoured either for non-acceptance or non-payment, then Macrae & Co. would have been immediately exposed to the very serious loss of being sued as drawers of the bills, with re-exchange and all incidental expenses, while still liable to account for the proceeds of the shipment by the Scandia. The circumstance, that the bills were remitted to Currie in an unsealed envelope addressed to the plaintiff, entirely accords with the notion that the bills were not to be handed over to the plaintiff till Currie had accepted them, and that Currie was not to accept them unless he was in a situation to honour them when they became due. But, "when the said bills arrived in England, the said Currie was so circumstanced that he had no anticipation of being able to meet the said bills, or either of them, had he accepted the same." We are therefore of opinion that he did well in not handing them over to the plaintiff; that the plaintiff would not have been aggrieved had they then been destroyed; and that the plaintiff acquired no property or interest in them by their accidentally coming into his possession.

Ex parte Mackey in re Morrison, 2 Mont. D. & De Gex, 136, and the other decisions cited on behalf of the plaintiff, appear to us to be good law, but to have no application to the present case. We therefore give judgment for the defendants.

Judgment for the defendants.

*The DEPOSIT and GENERAL LIFE Assurance Company Registered *v.* JOHN AYSCOUGH. *June* 6. [*761

Count by a Joint Stock Company against a shareholder, in the statutable form (7 & 8 Vict. c. 110, s. 55), for calls. Plea: that defendant was induced to become shareholder by the fraud of plaintiffs.

Held a bad plea, as it did not show that defendant had ceased to be a shareholder, or discovering the fraud, renounced the shares, and all benefit to be derived from them; and, therefore, admitted that he was a shareholder.

COUNT. That "defendant, as and being the holder of certain (to wit) 700 shares in the Company, was and is indebted to the said Company in a certain sum (to wit) 350*l*., for certain instalments of capital, then and still due and payable by him to the said Company in respect of the said shares: yet defendant hath not paid the same."

Plea: "that defendant was induced to become the holder of the said shares through the fraud, covin, and misrepresentation of the plaintiffs and others in collusion with them." Demurrer. Joinder.

Badeley, for the plaintiffs, was stopped by the Court.

Quain, in support of the plea.—The form of the count is given by stat. 7 & 8 Vict. c. 110, s. 55; but in substance it is founded on the contract of the defendant, made when he became a shareholder. Fraud avoids that contract like all others. [Lord CAMPBELL, C. J.—The defendant, for aught that appears on the record, keeps the shares and takes the benefit from them, and yet refuses to pay calls?] If he has done anything to affirm the contract, it will be good matter for a replication; but in pleas of fraud it is not necessary to aver that the contract has been disaffirmed. The fraud may perhaps not be discovered till the moment of the plea, *which is itself a disaffirmance. [CROMPTON, J.—When the record shows that the contract has been [*762 executed so far that the defendant has received a benefit, I have doubted whether, in an action on the contract, the plea of fraud must not show that he has restored what he has received. But this action is not upon the contract; it is given by stat. 7 & 8 Vict. c. 110, s. 55, against the holder of shares; and your plea is not good unless it shows the defendant not to be the holder of the shares. He is holder at least till he disaffirms, though he became so in consequence of fraud.] In Newry and Enniskillen Railway *v.* Coombe, 3 Exch. 565,† it was held that infancy was a good plea without any averment that the defendant did not adopt the shares when he came of age. In Burnes *v.* Pennell, 2 H. L. Ca. 497, 522, the appellant failed in proving fraud; but Lord Campbell, in delivering judgment in the House of Lords, says that the acts of the directors must be looked to: "if the plaintiff has been deceived and defrauded by them, and induced by them to purchase the shares by their false representations, the interlocutor must be reversed."

Badeley was not called upon to reply.

Lord CAMPBELL, C. J.—I am of opinion that the plea is bad. The

action is brought under stat. 7 & 8 Vict. c. 110, s. 55, which gives this action against the holder of any shares at the time when instalments become due; and the count contains the averments declared by that enactment to be sufficient. The plea is, I think, insufficient, inasmuch as it admits that the defendant still *is a shareholder. It is now well settled that a contract tainted by fraud is not void, but only voidable at the election of the party defrauded. There is nothing on this record to show that the defendant has avoided the contract by which he became a shareholder. He had a right, if he pleased, notwithstanding the fraud, to keep the shares and receive the dividends; and he may have intended to do so. The plea therefore should go further, and show, not only that he was induced to become a shareholder through fraud, but that on discovering the fraud he disaffirmed the transfer of the shares to him. In Newry and Enniskillen Railway *v.* Coombe the plea was infancy, and that the defendant, whilst an infant, disaffirmed the transfer. It was held that, if the defendant, after coming of age, affirmed the transfer, that would be a matter for a replication, and need not be negatived in the plea; but there the plea showed the transfer void, unless an affirmative act were done to render it valid; here it shows the transfer valid, unless an act was done to avoid it. In Burnes *v.* Pennell no question arose as to the forms of pleading, or on whom the burthen of allegations lay. I hope that the opinion I then expressed will be found to be correct, and that a shareholder, induced to become such by the frauds of directors, may get freed from his liability. I have myself no doubt that he may: but, to do so, he must cease to be a shareholder; and this plea does not show that the defendant has so ceased.

*763]

COLERIDGE, J.—I am of the same opinion. The substantial averment in the count is that the defendant was, at the time the instalments became due, a holder *of shares. By stat. 7 & 8 Vict. c. 110, s. 55, proof of that averment is enough. The defendant, though he was induced to become a shareholder by fraud, is entitled to the shares, and to all benefits arising from them, until he ceases to be the shareholder. His plea does not show that he has ceased to be the shareholder, or has taken any steps to cease to be so. It admits that he continues to be entitled to all the benefits from the shares, and is, therefore, no defence to an action for the instalments.

*764]

(ERLE, J., had left the Court before the conclusion of the argument.)

CROMPTON, J.—I see nothing on this plea to show that the defendant is not, up to this moment, the shareholder entitled to the benefits to be derived from those shares. He may have been induced to purchase the shares by the frauds of the directors, but from innocent vendors. Others, who are innocent, may have been induced to act on the faith of seeing that the defendant was a shareholder. He may have long received dividends as a shareholder. All this is consistent with the present

plea, which does not deny the averment that he is the holder of these shares.

I think that, if in such a case as this fraud can be made a defence at all, the plea must show that the defendant had done no acts to make himself a shareholder except those induced by the fraud; and that, as soon as he discovered the fraud, he disaffirmed the transfer to him, and gave up the shares, and that he ceased to be a shareholder. I am clearly of opinion that the present plea does not show enough.

Judgment for plaintiff.

*TAYLOR *v.* WAKEFIELD and Another. *June* 9. [*765

It was verbally agreed, between the owner of goods and a person who was in possession of those goods as his tenant, that the tenant might, if he pleased, at the termination of his tenancy, purchase the goods for a sum exceeding 10*l.*, but was not to take them till the money was paid. At the expiration of the tenancy the buyer tendered the price; but it was refused by the vendor, who denied the validity of the bargain. After this the buyer proceeded to take away the goods; the vendor prevented him, and took possession of them. In an action of trover by the buyer against the vendor,

Held, that on these facts there was no evidence to go to the jury of an acceptance and actual receipt to bind the bargain; as at the time when the buyer took to the goods as owner the parol contract had been already disaffirmed by the vendor. *Semble*, that if the buyer had been authorized by the contract to take the goods as owner, and had, without any fresh authority from the vendor, taken to them as owner before the contract was disaffirmed, it would have bound the contract, not only in favour of the vendor, but also in favour of the buyer.

TROVER for machinery, with a count for an assault. Plea to the whole: Payment into Court of 10*l.* Replication, that the sum was not enough.

On the trial before Willes, J., at the last Liverpool Spring Assizes, it appeared that the defendants were mortgagees in possession of three mills, one of which was a linting mill, and of the machinery in them which did not consist of fixtures. A negotiation took place between plaintiff and defendants for the purchase of the mills and machinery; and he was let into possession of all three, under a written agreement, by which he became tenant to the defendants from week to week of the three mills and machinery, terminable on twenty-one days' notice, with an option to the plaintiff to become purchaser of the whole machinery in all three mills for 813*l.*, being the sum at which the whole was valued. After this there were verbal negotiations, as to which there was contradictory testimony. The plaintiff's evidence was that it was finally agreed, by word of mouth, that he should have the option, at the termination of the tenancy, of taking the linting machinery only *on payment of 272*l.* 17*s.* 3*d.*, but that it was not to be removed [*766 until paid for. The defendants' case was, that they never agreed to divide the sale, and that the plaintiff was to take and pay for all the machinery or none. The tenancy was subsequently determined by

notice to quit. On the day on which the tenancy terminated, 272*l.* 17*s.* 3*d.* was tendered on behalf of the plaintiff as the price of the linting machinery, and refused by the defendants, who did not acknowledge the bargain. Subsequently on the same day the plaintiff, who was still in occupation of the mills and machinery, proceeded to carry away the linting machinery; the defendants forcibly prevented it. A scuffle ensued, during which the assault took place. The defendants' counsel contended that the damages were to be estimated on the supposition that the plaintiff had no interest in the goods; for, even if the parol contract was as stated by the plaintiff, it was a contract for the sale of goods for more than 10*l.*, and there was no evidence of anything to bind the contract. The learned Judge ruled that there was evidence of an acceptance and actual receipt. He left the question to the jury whether the parol contract was as stated by the plaintiff, and whether there was an acceptance by him of the goods; telling them that, if so, the property in the linting machinery had vested in the plaintiff before the conversion. Verdict for the plaintiff, damages 50*l.*

Manisty, in last Easter Term, obtained a rule Nisi for a new trial on the ground of misdirection in this, that there was no evidence of an acceptance.

*767] *Watson*, *Hugh Hill*, and *C. Millward*, now showed *cause.(*a*) There was evidence, which must at this stage of the cause be taken to be true, of a parol contract, by which the defendants sold the machinery in question to the plaintiff. At the time of this parol contract the goods were already in the possession of the plaintiff as tenant to the defendants; and, that being so, there could be no further physical delivery; there might, however, be a change in the nature of the holding of the plaintiff; and, as soon as that change took place, and he ceased to hold as tenant, and came to hold as vendee, there was an acceptance and receipt sufficient to bind the contract; Edan *v.* Dudfield, 1 Q. B. 302 (E. C. L. R. vol. 41), Marvin *v.* Wallis, ante, p. 726, and the principle recognised in the judgment in Lillywhite *v.* Devereux, 15 M. & W. 285.† [ERLE, J.—There are authorities that, if the parties were reversed, the defendants might adopt the act of the plaintiff as an acceptance binding the contract against him. But is there any case in which the bailee taking to the goods has been held to bind the bargain in his own favour?] The acceptance and receipt which bind the bargain as against either bind it as against both: there may be more difficulty in proof; but here the question is whether there was evidence.

Manisty, in support of the rule.—It is to be taken, for the present, that the plaintiff's account of the verbal contract is the accurate one, and that the defendants bargained with him that, on paying the price,

(*a*) Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, Js. The argument was resumed and completed before the same Judges on Tuesday, June 10.

he might take as owner the goods already in his possession as *tenant, but not until payment. And it may be conceded that, [*768 in cases where a bailor sells goods to a bailee by parol, if whilst that parol bargain is unrevoked, the bailee, in pursuance of it, takes to the goods as his own, it would be an acceptance not only binding the contract as against himself, but also, being an acceptance by the authority given by the vendor in the parol bargain, it will bind the vendor. But in this case there was no pretence that the plaintiff had any authority to take the goods until the price was paid; nor did he attempt to take to them till after he had tendered the price. It was then too late; for the defendants, by refusing the price, had, in an unequivocal manner, repudiated the parol contract (which was then still not binding), and so revoked any authority to accept the goods.

Lord CAMPBELL, C. J.—I should have been strongly inclined to say that, if the nature of the plaintiff's possession had been changed by him, by virtue of the authority given in the parol contract, it would have been an acceptance binding the contract as against the defendants. But, when it appears that the parol authority was revoked before it was acted upon, it is clear that cannot be. Now, in this case, it was an uncontested fact that the defendants refused to accept the price, and disaffirmed the contract, whilst it was yet unbound and the authority revocable. That being so, there was no evidence of any acceptance: and the rule for a new trial must be absolute.

COLERIDGE, J.—What is relied on here as binding the contract is an act of the buyer, who was already in possession of the goods, changing the character in which *he held them. But till that act was [*769 done there was no binding contract, and it was in the power of either to be off the bargain. Now, when the very act relied on came to be done, the vendors refused the money, and disaffirmed the contract.

ERLE, J.—Whenever goods are in the hands of a person as lessee or bailee, with a parol contract for the purchase of those goods, which is not yet binding, if the purchaser takes to the goods as such, and changes the character in which he holds them, it is an acceptance as against him, and it is clear that the vendor may, if he has done nothing to preclude himself, adopt that acceptance and hold the contract bound. And it may be, though it has not I believe been yet decided, that such an act, if done by the purchaser in furtherance of the contract before it is revoked, would bind the contract as against the vendor also. I am inclined to think that it would be an acceptance by the vendor's authority already given in the contract, if acted upon before it was revoked. But, if before that parol authority is acted upon it is revoked, and the vendor declares that there is no binding bargain, the subsequent taking to the goods by the buyer is unauthorized and tortious, and cannot be an acceptance, which, to bind the bargain, must at all events be with

the assent of the vendor. Here, before the act relied on, the vendors said the bargain was not binding.

CROMPTON, J.—I think the counsel on both sides state the law accurately. When goods are sold by parol, and nothing remains to be done before the delivery, if the *goods are already in the hands of the vendee, he may take to them under the contract, and it is an acceptance and receipt by the authority of both parties. It is the only way, in such cases as Edan *v.* Dudfield, 1 Q. B. 302 (E. C. L. R. vol. 41), and Marvin *v.* Wallis, ante, p. 726, in which there can be a delivery. The contract is binding as soon as the bailee changes his character and holds as owner. But then it appears, on the facts here, that by the contract there was to be no delivery till the price was paid; and it appears that, when the price was tendered, before any possession as owner was, or under the contract could be, taken, the vendors refused the money, and declared the contract not binding. If we held that it was sufficient to tender the money and take possession afterwards, it would be in effect holding that the contract was binding before the possession was taken; for, unless it was, the subsequent taking of possession was tortious; and it is admitted on all hands that a tortious taking possession cannot make the contract binding. Rule absolute.

*770]

---

*771] *JOHN CHADWICK and Others *v.* The City of DUBLIN Steam Packet Company. *June* 11.

A sailing vessel, sailing on the starboard tack very near the wind, met a steamer. The vessel did not put her helm to port, and a collision ensued. In an action by the owners of the vessel against the owners of the steamer, evidence was given of negligence on the part of the crew of the steamer; it was contended that the plaintiffs could not recover, as, by The Merchant Shipping Act, 1854, sect. 296, their vessel should have put her helm to port. The judge left it to the jury to say whether the vessel was close-hauled on the starboard tack, and whether she would have lost command by putting her helm to port; intimating his own opinion as to the facts to be that a vessel may be close-hauled, though not quite so near the wind as she could lie; and that a vessel going about was not under command. The verdict was for the plaintiff.

Held, on a rule for a new trial on the ground of misdirection, that the direction was unexceptionable.

ACTION for, by defendants' servants, negligently navigating a steamship called the Royal William, and running down the plaintiffs' schooner, called the Thomas Clifton.

Plea: Not Guilty. Issue thereon.

On the trial, at the last Liverpool Spring Assizes, before Willes, J., it appeared that, on the night of the 18th October, 1855, the plaintiffs' schooner came in collision with the defendants' steamer, and was sunk. The controversy was, whether the circumstances were such as to make the defendants liable for the loss. Evidence was called on both sides, by which the facts appeared to be that, on the night in question, the

vessels were off the Welsh coast, six or seven miles from the shore. It was a moderately dark night; the wind was about north-west; the schooner was making for Anglesea with her head west-south-west, and the steamer was making for Liverpool, with her head south-east-by-east one half east. The schooner was not seen by those on board the steamer till the vessels were near each other. As soon as the schooner was seen, the steamer's helm *was put to port; the schooner's helm was not put to port; and the collision took place. The [*772 evidence for the plaintiffs was that the schooner had lights, and that, if there had been a proper look-out on board the steamer, the schooner would have been seen in time, and the accident avoided. The evidence for the defendants was that there was a proper look-out, and that the schooner could not have had proper lights, or she would have been seen earlier. It was also contended that the schooner ought, in obedience to The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), sect. 296, to have put her helm to port, and that, not having done so, the plaintiffs were barred by sect. 298. The learned Judge summed up at considerable length. In effect, he told the jury that it would be convenient to consider the defence arising from not porting of the helm separately from that arising from the alleged want of the lights. He pointed out that, the schooner's head being about west-south-west, and the wind north-west, she must have been on the starboard tack, and within about six points of the wind, and commented on the evidence of the witnesses, by which it appeared that the vessel was almost, if not quite, as near the wind as she could lie, and consequently that, if the helm were ported, she must have had her head thrown into the wind, and not have been kept under command, until she went about on the other tack, in which case, considering the course of the steamer, the heads of the two vessels must have been in such directions as to render it impossible for them to pass each other on the port side; and he expressed his opinion to be that the direction in sect. 296, for vessels to port the helm so as to pass on the port *side of each other, did not apply to a ves- [*773 sel in such a position that the effect of porting her helm would be to prevent the vessels from passing on the port side of each other. He also expressed his opinion to be that the word "close-hauled," in the section, was not used in the sense of being so very near the wind that it would be impossible to put the vessel a little nearer; but in a broad sense; and that a vessel might be in such a position, with reference to the wind, as to be called, for all practical purposes, "on the starboard tack close-hauled," although it was possible that the helm might be put a little more to port without sending her round upon the larboard tack. He left it to the jury to say, on the evidence, whether the vessel was close-hauled, and whether, if the helm had been put to port, command over the vessel would have been lost; and told them that in his opinion, if such was the case, the schooner would have been

right in keeping her course, supposing it to have been daylight so that no question about the lights could have arisen. He then left the disputed fact, as to whether there was negligence or not, to the jury. No complaint was made as to the manner in which this latter question was left to the jury. The verdict was for the plaintiffs.

Edward James, in the ensuing term, obtained a rule nisi for a new trial on the ground of misdirection. The following grounds were stated in the rule: "That the Judge was wrong in taking upon himself to pronounce what was the meaning of close-hauled, and in not leaving such question to the jury. That he was wrong in telling the jury that the schooner's helm need not have been ported, if the effect of such porting would have been to bring the vessel into the wind. That he
*774] was *wrong in not leaving it to the jury whether, if the schooner had ported her helm, she could, as a question of seamanship, and independently of his construction of the statute, have been kept under command, and whether a ship going about can be said to be under command. That he was wrong in telling the jury that, if the matter had occurred during the daylight, he could not doubt that the schooner would have been right in keeping her course."

Hugh Hill and *C. Milward* now showed cause.—The Merchant Shipping Act, 1855 (17 & 18 Vict. c. 104), sect. 296, is as follows: "Whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port so as to pass on the port side of each other; and this rule shall be obeyed by all steam ships and by all sailing ships whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command." The main question at the trial did not arise on this section: but there was a question raised, whether the directions of the statute had been violated by the schooner; and it is with reference to this point that the summing up is complained of. The enactment is with
*775] reference to ships meeting each *other, which, as a general rule, are to put their helms to port "so as to pass on the port side of each other;" and, as the effect of putting the helm to port is to turn the head of the vessel to starboard, this effect will generally be produced. But, if the course of a vessel be such that the wind is on the starboard, and that she is already as near the wind as she can be whilst under command, or, in other words, if she be close-hauled on the starboard tack, the effect of putting the helm to port must be to throw her

head into the wind; she must lie helpless till her head has come round on the other tack; during which time of course the risk of collision would, generally speaking, be increased; and, after she got under command on her new course on the port tack, she would not generally pass the other vessel at all. In the present case, for instance, the schooner, not being able to lie nearer than within six points of the wind, and the wind being north-west, the new course, when she came round on the port tack, supposing her then close-hauled, would have been north-north-east, so that instead of passing the steamer she would turn her stern to her; and, if the steamer did overtake her and pass her, they could not pass on the port side of each other, but necessarily must pass on the starboard side of the one and the port side of the other. Accordingly, the enactment has a proviso that due regard shall be had, "as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command." The Judge in effect told all this to the jury, as explaining to them the enactment, and showing that the Legislature did not cast upon the schooner the duty of porting her helm if the effect of doing so would have been to prevent her from being under command. The old rules of the *Admiralty applied only when [*776 the vessels were meeting each other with their heads opposing each other; The London Packet (Britt), 2 W. Rob. 213; and the new statutable rule is the same. The Judge certainly did not conceal from the jury his opinion that the vessel in this case was close-hauled on the starboard tack, and that if her helm had been put to port she would not have been kept under command; but he left it to the jury as a question of fact whether this was so or not.

Edward James and *Quain*, in support of the rule.—The rule in the enactment is intended to apply whenever the vessels are likely, if they continue their courses, to come into collision. It is in that sense that the word "meet" is used; it is sufficient that they should be approaching each other; The James, 12th February, 1856, 27 Law Times, 1. The steamer had a right to act on the supposition that the schooner would, in obedience to the statute, put her helm to port. The statutable rules should be literally followed; Valentine *v.* Cleugh, 8 Moore, P. C. C. 167. The Judge took upon himself to determine that the vessel was close-hauled, though she might have been brought nearer the wind; and also that whilst putting about she would necessarily be out of command. But close-hauled is "the arrangement or trim of a ship's sails when she endeavours to make a progress in the nearest direction possible towards that point of the compass from which the wind blows;" Falconer's Marine Dictionary. Such a vessel cannot go nearer the wind without putting about. She may in doing so miss stays, and so command may be lost; that is one of the dangers of navigation. But *if she goes about in ordinary circumstances command is not [*777 lost; and the Legislature evidently contemplated that a vessel

close-hauled on the starboard tack should, in ordinary circumstances, put her helm to port, that is, go about.

Lord CAMPBELL, C. J.—I am of opinion that this rule must be discharged. As to the last point mentioned in the rule, it is obvious that what the Judge said was with the view of separating the question as to the lights from that as to porting the helm. If the schooner was in such a position that she ought to have put her helm to port, she violated sect. 296; but I am of opinion that she did not in fact violate that enactment, and that there was no misdirection in the manner in which the question was left to the jury. Sect. 296 does not absolutely require that vessels shall always put their helms to port; such a course might often lead to the ruin of both ships: it directs that they shall do so; but the duty is qualified; and the direction is subject "to the proviso that due regard shall be had to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command." Now I do not find that the Judge in this case stated to the jury as a matter of law that this vessel was close-hauled; he left them at liberty to find that she was close-hauled, though she might not be quite so near to the wind as she could lie; and I think the jury very justly found that the ship was close-hauled, though they might think that she could be put a quarter of a point nearer to the wind. I think the Judge left it to the jury to say,

*778] whether the vessel could put her helm to *port and be kept under command. He made observations on the evidence, showing what he thought; but he left the fact to the jury; and I think they were perfectly justified in finding the verdict which they did.

ERLE, J.—I am of the same opinion. I take it that there was evidence of a cause of action against the steamer, unless the schooner was shown to have violated sect. 296, and that the schooner did not in fact put her helm to port; so that the question came to be, whether she was within the exception, to the general direction to port the helm, that a ship close-hauled on the starboard tack need not do so if, by doing so, she will not be kept under command. I do not find that the Judge defined as a matter of law either the word "close-hauled" or the words "kept under command;" but he used them in summing up like other words. He used the word close-hauled, as I understand it, not as meaning literally as close as possible to the wind, but in the sense that a vessel may be more or less close-hauled—may be close-hauled though a little off the wind. Neither did he direct the jury as a matter of law that a vessel in the wind's eye was not under command. If I understand the argument in support of the rule, it is, that no vessel is close-hauled so long as it is possible to go nearer to the wind, and that no vessel is out of command, though in the wind's eye, if she be in the course of going about. I do not think the Legislature intended to use the words in such a sense: but I think the question does not arise on

this summing up, which left it to the jury to say whether the helm could be put to port with due regard to keeping the schooner under command.

*CROMPTON, J.—This rule has been granted, not on the ground that the verdict was against evidence, but on the ground of misdirection; and I have been unable to discover any. The counsel in support of the rule have argued as if the proviso applied only to the dangers of navigation, and to the risk of losing command of the vessel when that would be one of them. But I think that is not so; due regard is to be had to the dangers of navigation at all times, and in all situations, and, when the vessel is sailing close-hauled on the starboard tack, to keeping her under command. The meaning seems clear enough. The exception from the general rule is, that the vessel sailing close-hauled on the starboard tack need not port her helm if by so doing she would go about, and command be lost. [*779

(No fourth Judge was present.) Rule discharged.

To sustain an action for damages occasioned by collision between two vessels, it must be shown that the plaintiff was using ordinary care. Where both parties are in fault, no damages can be recovered by common law: the law maritime apportions the damages according to the respective degrees of fault in the parties: Halderman *v.* Beckwith, 4 M'Lean, 286; Barrett *v.* Williamson, Ibid. 589. Where a collision between two vessels takes place by inevitable accident without the negligence or fault of either, each must bear its own loss: Stainback *v.* Rae, 14 Howard U. S. 532. A vessel has no right to neglect proper precautions and then throw the entire responsibility of an accident on a steamer. A steamer is only bound to have a reasonable and proper look-out, and is not bound to employ unusual or extraordinary means to discover vessels which, from their own carelessness and negligence, could not have been seen, except by the use of such extraordinary precaution: Ward *v.* Armstrong, 14 Illinois, 283.

JOB and Another *v.* LANGTON. *June* 11.

By a case stated between assured and underwriters on ship, it appeared that the ship, having sailed from Liverpool with a cargo on board, ran on shore, accidentally, on the coast of Ireland. In order to get her off it became necessary to discharge the whole of the cargo, which was accordingly taken out and placed in store at Dublin. The ship was then got off by digging a channel for her, and employing a steam tug, and was towed to Liverpool to be repaired. The cargo was shipped in another vessel, and forwarded to its destination; but, for the purposes of the case, was to be considered as having been carried on by the original ship after she had been repaired.

Held, that the expenses incurred, after the cargo was in safety, in getting off the ship and towing her to Liverpool for repair were not chargeable to general average, but to ship alone.

THIS was a case stated, without pleadings, for the opinion of this Court, by an order of Coleridge, J., and was substantially as follows:

*780] On the 16th March, 1855, the plaintiffs, who are *shipowners in Liverpool, and owners of the barque Snowdon, effected with the defendant, who is an underwriter in that port, a policy of insurance upon the barque Snowdon, valued at 6500*l.*, at and from Liverpool to Saint John's, Newfoundland. The defendant underwrote the policy for 100*l.* A copy of this policy accompanied the case, and was to be referred to as part of it. It was a policy on "ship, valued at 6500*l.*," and was in the usual printed form, filled up.

The vessel sailed from Liverpool, with a general cargo, on 20th March, 1855; and, in consequence, it is believed, of the compasses not having been properly adjusted, the same night ran ashore in Malahide Bay, on the coast of Ireland. The vessel, at low water, was high and dry; and it became necessary to discharge the whole of the cargo and the ballast before she could be got off. After the cargo (with the exception of fifty tons of coals, which were left on board to stiffen the vessel) was discharged, and placed in store at Dublin, the vessel was got off, at considerable cost, with the aid of a steam tug, and by cutting a channel for the vessel. The fifty tons of coals and the ballast were taken out of the vessel into lighters, before she was floated off, and immediately afterwards were reshipped. The vessel was then towed to Liverpool, where she could be examined and repaired better than at Dublin. The steam tug did no work at the ship until after the cargo was landed, and the coals and ballast taken out of her. In order not to lose the market at Saint John's, the cargo was transhipped at Dublin on board another vessel, and forwarded to its destination. By mutual agreement the circumstance that the cargo was not kept for the Snowdon was not to affect the question in this case, which was to be

*781] *disposed of as if the Snowdon, after being repaired, had carried on the cargo.

The papers have been before several average adjusters, to make an apportionment of the general average expenses; but they do not agree as to the mode of adjusting the loss. Some charge the expenses incurred (after the cargo was on shore and in safety) in floating the ship, and towing her into port, to general average, as expenses incurred for the general benefit of the ship, cargo, and freight; while others charge these expenses as particular average, payable by the ship alone. Amongst adjusters a common practice has been to adopt the latter mode of stating similar losses; but some cases have occurred in which those adjusters, who adopt that practice as a general rule, have considered it equitable that such expenses should be charged as general average, and where they have, consequently, deviated from their ordinary rule. The plaintiffs originally claimed from the defendant the sum of 13*l.* 0*s.* 6*d.* The defendant has paid to the plaintiffs 8*l.* 11*s.* 6*d.* of the claim, which is the amount due on the principle that all the expenses, both before and after the cargo was out of the ship,

belong to general average; and he disputes his liability to the balance of the claim. The Court is to be at liberty to draw any inference of fact which a jury might have drawn.

The question for the opinion of the Court is, Whether the expenses incurred in getting off the ship and taking her to Liverpool for repair, after the entire cargo was discharged, were chargeable to general average, or to particular average on the ship alone. If they are chargeable to particular average, the plaintiffs are to be entitled to judgment for 4*l.* 9*s.*; if they are not *so chargeable, judgment [*782
is to be entered for the defendant.

The case was argued on a previous day in this Term.(*a*)

Mellish, for the plaintiffs.—The question is really between the underwriters on cargo, who are bound to contribute to general average, and the underwriters on ship. Here the stranding of the ship was fortuitous; and only extraordinary expenses voluntarily incurred for the joint preservation of the ship and cargo are general average. In the present case it was necessary, for preservation of the ship and cargo, that the cargo should be taken out; the expenses up to that point, being for the whole, have been charged to general average: but the dispute is as to the expenses incurred, after the cargo had been safely warehoused on shore, in getting off the ship. These were for the preservation of the ship alone. It is contended on the other side, that all extraordinary expenses incurred for the preservation of the whole maritime adventure, that is, for bringing the ship and goods safely to their destination, are general average. That is too wide a proposition; according to it the repairs of the ship would be general average. The contract between the shipowner and the owner of the cargo, and the contract between assured and underwriter, are different. The shipowner contracts to carry the goods to their destination, and incur all expenses necessary for that purpose; in the ordinary bills of lading perils of the sea are excepted; and, if the *cost of repairs [*783
of the ship would be extravagant, the shipowner may elect to treat the completion of his contract as rendered impossible by the perils of the sea; but, if he does not so elect, he cannot charge expenses of repairs against the owner of the cargo. If the cargo is damaged, the master takes ordinary steps to preserve it, as part of the shipowner's contract: if they are extraordinary he takes them as agent for the owner of the cargo, and they are charged to cargo only. It is only when they are for the joint benefit that they can be charged to both. Then, the ordinary policy contains a clause authorizing the assured to sue and labour for the preservation of the subject-matter of insurance, as agent of the underwriter; but the clause does not authorize him to sue and labour for the preservation of the cargo at the cost of the

(*a*) June 3d. Before Lord Campbell, C. J., Coleridge and Erle, Js. Crompton, J., heard part of the case, but left the Court before the termination of the argument.

underwriter on ship. Nothing can be charged to both that is not done for both. Any other arrangement would lead to unjust results in many cases. The owner of the cargo, as here, often derives little or no benefit from the expenses, which may be of service to the ship but not have preserved the cargo. Where the expenses are incurred for the joint preservation of the ship and cargo, the principle of division, according to the proportional value, is applicable; but it is applicable in that case only. The rule is laid down by Lawrence, J., in Birkley *v.* Presgrave, 1 East, 220, 228: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average." In Abbott On Shipping, by Shee, 8th ed., p. 490, part 4, ch. 10, s. 4, speaking of damage arising from stranding, it is said: "if the stranding be the result of the ordinary perils of *the sea, without any sacrifice on the part of the master, the expenses incurred must fall upon the ship alone. Benecke (p. 215) illustrates this distinction by a case which happened within his experience. A vessel, on her voyage from London to Hamburgh, was driven, by a high tide, on a piece of ground called the Grassbrock, very near the latter port. The cargo was unladen, not with a view to set the vessel afloat, but for delivery to the consignees; and the ship was dug out. The vessel, in this case, could not be called on to contribute to the unloading, although she was accidentally benefited by it; and there was no ground for contribution, by the owners of the cargo, to the expense of digging her out, because that was done for her own benefit, it being of no consequence to the consignees whether she were floated or not. In this case it will be observed that the damage was the result of no voluntary sacrifice; the expenses were incurred for no common object; it was not therefore in its nature general average. The rule would therefore seem to be, that if the stranding be voluntary, to save the ship and cargo, the damage done to the ship becomes a general average; but if involuntary, and the cargo be saved, in whole or in part, no general average is due." [*Blackburn.*—That passage is the editor's. In the last edition published in Lord Tenterden's life (5th ed.), the opposite doctrine is laid down.] It is, at least, in conformity with Power *v.* Whitmore, 4 M. & S. 141, 149, where Lord Ellenborough says, "that general average must lay its foundation in a sacrifice of part for the sake of the rest;" overruling Plummer *v.* Wildman, 3 M. & S. 482. In Jackson *v.* Charnock, 8 T. R. 509, the same principle appears. In Arnould On *Insurance, vol. II., p. 903, it is said that, even supposing the expenditure to have been of an extraordinary nature, it must have been also incurred for the joint benefit of both ship and cargo, in order to be chargeable to general average. If it were enough that it was so incurred indirectly, then the mere repairs of the ship would be so chargeable, which they are clearly not. [Lord CAMPBELL, C. J.—It may be argued that

*784]

*785]

extraordinary repairs might be so chargeable, though not ordinary repairs.] No mere repairs are so chargeable; Hallett *v.* Wigram, 9 Com. B. 580 (E. C. L. R. vol. 67). The particular case of expense incurred in consequence of accidental stranding is noticed by Arnould, vol. II., pp. 915, 916; and it is there laid down that both ship and cargo must be in peril to make the expense incurred in getting her off chargeable to general average. Here the repairs were after the ship had been got off; but no distinction can be made, as to the present question, between the expense of getting her off for the purpose of repairing her, and the expense of the actual repairs.

Blackburn, contrà.—Where the master cannot otherwise procure funds he may sell part of the cargo, and so obtain a forced loan from the owner of the cargo. The loss thus occasioned is too remote a consequence of a peril of the sea to be chargeable to the underwriters at all; Sarquy *v.* Hobson, 2 B. & C. 7 (E. C. L. R. vol. 9); Rosetto *v.* Gurney, 11 Com. B. 176 (E. C. L. R. vol. 73); and it is almost self-evident that it cannot be general average, which is all that Hallett *v.* Wigram, 9 Com. B. 580 (E. C. L. R. vol. 67), decides. In inquiring what is general average, the terms of the policy of insurance give no assistance. The underwriter engages to indemnify for general average; but *general average depends on the general maritime law, wholly irrespective of insurance. [Lord CAMPBELL, C. J.—Certainly. [*786 It was founded on the Rhodian law before insurance was known.] Neither does it depend on whether there is a bill of lading or a charter-party, or not, but upon the general nature of a maritime adventure. The primary object is the arrival of the ship with her cargo at her destination. Ordinary acts done to bring this about are done by the shipowner, as part of his duty; Duncan *v.* Benson, 1 Exch. 537:† but extraordinary acts done for this object give rise to general average. If the adventure be abandoned as in the case in Benecke, cited in Shee's Abbott (8th ed. p. 490), and in 2 Arnould, 916, the expenses incurred after the abandonment must be incurred for the articles separately, and cannot be brought into general average. It is then as in the case of wreck, when, as is said in Émérigon, Traité Des Assurances, chapitre 12, Sect. 41, § 1 (1st volume of the edition by Boulay-Paty, p. 598), as in case of fire on land it is: *Sauve qui peut. Chi salva, salva; chi perde, perde.* But in this case it is, by agreement of the parties, to be taken that the adventure was not abandoned; and their rights are to be the same as if the Snowdon had, in consequence of this expense, carried on the goods to their destination. Neither is there any claim made for the damage occasioned by the accidental stranding; such unintentional damage clearly is not general average. But, though the stranding was fortuitous, the expense of getting the vessel off shore is general average. In the passage cited from Shee's

*787] Abbott (8th ed. 490) the editor says the contrary: and, *from the inconvenient way in which that work is printed, it has been cited, on the other side, as said by Lord Tenterden. But in the last edition published in Lord Tenterden's lifetime (Abbott on Shipping, 5th ed. 349) it is said, "the damage voluntarily done to a ship by cutting its deck or sides in order to facilitate a necessary jettison, or by running it on a rock, shallow, or strand, to avoid the danger of a storm, or of an enemy, and the expense of recovering the ship from this latter situation," are to be made good by contribution. He does not mean to confine this to cases in which the situation has been voluntarily produced; for, in the example which he gives at p. 359, he charges to general average "the expense of bringing the ship off the sands," though the stranding there was accidental. The argument on the other side assumes that in order to constitute general average the whole must be saved from physical destruction; but it is enough if it be a voluntary extraordinary sacrifice to save the adventure. Thus, the unloading of the cargo after the ship is safe in a port of distress is general average, if necessary for repairs, though those repairs themselves are not general average; Hall *v.* Janson, 4 E. & B. 500 (E. C. L. R. vol. 82). The reason there assigned by Lord Campbell, C. J., is that "they are deliberately done for the joint benefit of those who are interested in the ship, the cargo and the freight. In Émérigon, Traité Des Assurances, chapitre 12, Sect. 41, § 2 (edition by Boulay-Paty, vol. 1, p. 600), it is laid down that stranding is particular average, unless intentional to save the ship, and producing safety. Émérigon then goes on: "S'il advient que le navire touche, le maître pourra faire *788] *décharger partie de sa cargaison dans d'autres vaisseaux, et seront les dits frais comptés pour avarie grosse sur le navire et la marchandise: Ordonnance de Wisbuy, art. 55. Les frais pour remettre à flot un vaisseau sont avaries grosses ou communes. Art. 6, titre des avaries. Ibid. Valin. Vid. Cleirac, p. 18, no. 4." This last citation from the Ordonnance of the Marine is not confined to cases of voluntary stranding, any more than that from the Ordonnance of Wisbuy. The passage already cited in Abbott on Shipping (5th ed. 349) is nearly a translation from this passage in Émérigon. [Lord CAMPBELL, C. J.—But, if the expenses of getting off the ship after the cargo is out are general average, why not the repairs themselves?] The repairs are within the owner's obligation to keep his ship seaworthy; but expenses preliminary to the repairs are not. It is difficult to determine where these preliminary expenses end: but the expense here is part of the same operation as the unloading the cargo; for the repairs could not be commenced until the whole had been accomplished. The argument on the other side, if logically followed out to its result, would prove that the taking out the first lighter load of the goods was general average, but the taking out of the second, when the first was

safe, was not. But the whole is one transaction. What difference does it make that the ship and goods were not got off simultaneously, when the result of the whole operation was that the whole adventure was completed and saved? Power *v.* Whitmore, 4 M. & S. 141 (E. C. L. R. vol. 30), is not in point: the items of the claim are given in the report at p. 145; the damage was not extraordinary; it was merely attendant upon the ordinary adventure. In Birkley *v.* *Presgrave, [*789
1 East, 220, 228, Lawrence, J., says, "all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the joint preservation of the ship and cargo come within general average." There may, no doubt, be some difficulty in deciding where ordinary expenses end and extraordinary expenses begin. [Lord CAMPBELL, C. J.—If the ship were unnecessarily and imprudently repaired, the expense would not be chargeable to general average.] Certainly not. Nothing is chargeable unless voluntarily incurred. [Lord CAMPBELL, C. J.—The master would not be bound to repair at all, if the expense of repair exceeded the value of the ship.] He would not; but he would not be acting beyond the scope of his authority from his owner in doing such repairs; Benson *v.* Chapman, 8 Com. B. 950, 963 (*a*) (E. C. L. R. 65). Here, at all events, what was done previously to the ship returning to Liverpool to be repaired was done for the preservation of the whole adventure, and is a proper subject for general contribution. Even the expense of warehousing the cargo would, abroad, be allowed as general average, though the English practice is different.

Mellish, in reply.—The hypothetical case put in Abbott on Shipping (5th ed. 359), Shee's Abbott (8th ed. 505), is not in point. The cargo there is supposed to be still on board when the ship is got off the sands; and, to adopt the only real test, as adopted in Birkley *v.* Presgrave, 1 East, 220, 228, both ship and cargo are supposed to be in peril, and saved by being taken off. In the passages quoted from Émérigon no mention is made as to whether or not the *cargo [*790
was in peril as well as the ship; but it is more probable that Émérigon was speaking of a case where both were in peril. Here the peril and the expense attached to the ship alone; and the expense is therefore chargeable on the ship alone. Wages of the crew, during the repairing a ship damaged by stress of weather, are chargeable to the owner; De Vaux *v.* Salvador, 4 A. & E. 420 (E. C. L. R. vol. 31). Worms *v.* Story, 11 Exch. 427,† decides that, if a vessel be damaged by perils of the sea so as to become unseaworthy, the owner, if he does not elect to abandon the voyage, must repair her. The expense incurred solely for the purpose of doing so ought to be chargeable to the ship.

Cur. adv. vult.

(*a*) S. C. 2 H. L. Ca. 696, in Dom. Proc., affirming the judgment of Exch. Ch. in Chapman *v.* Benson, 5 Com. B. 330 (E. C. L. R. vol. 57), which overruled the judgment of C. B. in Benson *v.* Chapman, 6 M. & G. 792 (E. C. L. R. vol. 46).

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

Upon the question submitted to the Court in this case, we are of opinion that the expenses incurred in getting off the ship and taking her to Liverpool for repair, after the entire cargo was discharged and in safety, are not chargeable to general average, but are chargeable to particular average on the ship alone.

There is no decision on the specific point; and there is no mercantile usage stated to guide us. We must, therefore, resort to the general principles on which this head of insurance law rests. We begin with the definition of general average by Lawrence, J., in Birkley *v.* Presgrave, 1 East, 228, "All loss which arises in consequence of extraordinary sacrifices made or extraordinary expenses incurred for the preservation of the ship and cargo," meaning "for *the joint benefit of ship and cargo." *791]
Here it cannot be said that there was any *sacrifice*, as in case of jettison of part of the cargo, or voluntarily cutting away masts or sails of the ship. The stranding was fortuitous, arising directly from perils of the sea. The expenses, to constitute general average, must therefore be brought within the second category, "extraordinary expenses incurred for the joint benefit of ship and cargo." They were extraordinary expenses not to be ascribed to wear and tear, and therefore to be borne by the underwriter: but are they to be considered as incurred for the joint benefit of ship and cargo, so that a portion of them ought to be borne by the owner of the cargo, or the underwriter of the cargo? Although the stranding was fortuitous, all expenses incurred from the misadventure till all the cargo had been discharged confessedly constituted general average. But how can it be said that the subsequent expenses in getting off the ship and taking her to Liverpool for repair were of the same character? The employment of the steam tug, and the cutting of the channel by which the ship was rescued, cannot, as was contended for, be part of the same operation as the unloading of the cargo; for the case expressly finds that "the steam tug did no work at the ship until after the cargo was landed, and the coals and ballast taken out of her."

We therefore do not see how these expenses are to be distinguished from the expenses of repairing the ship when she had been brought to Liverpool, which, it is admitted, must fall exclusively on the owner of the ship or the underwriter on the ship, as particular average. If the owner of the ship was to earn the stipulated *freight by carrying *792]
the cargo to Newfoundland, it was his duty to repair her and to carry her to a place where she might be repaired. Mr. Blackburn's position, that, the end in view of every maritime adventure being the arrival of the ship with her cargo at her destination, extraordinary acts done to effectuate this give rise to general average, would justify him in contending that these expenses do not constitute particular average: but, unfortunately for him, the expenses incurred in repair-

ing the ship at Liverpool, according to this reasoning, would equally be general average; for the repairing of the ship was an extraordinary act which was necessary for the arrival of the ship with her cargo at Newfoundland, and was as much for the joint benefit of ship and cargo as bringing her to Liverpool from Malahide Bay.

Under the circumstances stated, after the cargo had been safely discharged and warehoused, it does not even appear that it was for the advantage of the owner of the cargo that The Snowdon should be got off the strand and repaired. Of course we do not, contrary to the intention of the parties, attach any importance to the fact that the cargo was forwarded in another vessel; and we shall give our decision as if The Snowdon, after being repaired, had carried the cargo to its ultimate destination. But, in the absence of any statement to the contrary, we might infer (as the fact turned out to be) that there would be no difficulty in forwarding the cargo by another vessel. We do not say that there may not be a case where, after a fortuitous stranding of the ship and the cargo has been unloaded, expense voluntarily incurred by the owner of the ship to get her off, *and to enable her to complete the voyage, whereby the cargo, which otherwise must have perished, is carried to its destination, may be general average; as the stranding of a ship with a perishable cargo on a desert island in a distant region of the globe. But, in the present case, the owner of the ship, after the cargo was discharged, appears to us to have done nothing except in the discharge of his ordinary duty as owner, and for the exclusive benefit of the ship. Notwithstanding some expressions of Lord Ellenborough in Plummer *v.* Wildman, 3 M. & S. 482, 486 (E. C. L. R. vol. 30), we consider it quite settled that, by the law of this country, the expenses of repairing the ship, or, after the cargo is safe, of bringing her to a place to be repaired, cannot, under such circumstances, be made the subject of general average. [*793

We have examined all the authorities cited in the argument: but, not considering that there would be any use in now further commenting upon them, we give judgment against the defendant, as underwriter on the ship, in respect of the sum due for the expenses in question as particular average. Judgment accordingly.

If a ship, in case of extremity, be voluntarily run ashore and is afterwards recovered and performs her voyage, the damages resulting from the stranding are to be borne as general average: Bradhurst *v.* Columbian Insurance Co., 9 Johnson, 9; Columbian Insurance Co. *v.* Ashby, 13 Porter, 331. No loss or expense is to be considered as a general average and so applied in making up a loss, unless, in the first place, it was intended to save and preserve the remaining property, and unless, in the second place, it succeeded in doing so. The expenses and charges of going to a port of necessity to refit can properly be a general average only when the voyage has been or might be resumed.

But the doctrine does not apply, if the voyage has been abandoned from necessity: Williams *v.* Suffolk Insurance Co., 3 Sumner, 510. The expenses of raising a vessel, placing her in a condition for repair, and repairing her, fall under the denomination of particular average: Insurance Co. *v.* Fitzhugh, 4 B. Monroe, 160.

*794] *MEMORANDUM.

In this Term:

William Ballantine, of the Inner Temple, Esquire, Barrister at Law, was called to the degree of the coif: when he gave rings with the motto *Jacta est alea.*

And John Humffreys Parry, of the Middle Temple, Esquire, Barrister at Law, was called to the degree of the coif: when he gave rings with the motto *Spe et fide.*

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN

Trinity Vacation,

XIX. & XX. VICTORIA.(a) 1856.

The Judges of the Court of Queen's Bench who sat in Banc in this Vacation were:

COLERIDGE, J. — ERLE, J.
WIGHTMAN, J. — CROMPTON, J.

FAZAKERLY *v.* M'KNIGHT and ABBINETT. *June* 20.

To action against the acceptor of a bill of exchange for 337*l.*, defendant pleaded a release by deed. Plaintiff replied: 1. Non est factum; 2. That a blank was left in the deed for plaintiff's debt, which, after execution of the deed by plaintiff, was filled up erroneously, without plaintiff's authority.

The evidence was that, after the acceptance, plaintiff became indebted to defendant in 142*l.* for goods sold. That afterwards plaintiff signed the deed, which recited that defendant was indebted to certain persons parties thereto, in the sums set opposite to their names in the schedule; and, in consideration of a guarantee of 10*s.* in the pound by a third party, the creditors parties thereto released the debts then owing to them. Plaintiff executed the deed; but a blank was left opposite to his name, which afterwards, without his authority, was filled up with the sum of 337*l.* The jury found that the debt which the parties meant to be released was the balance after deducting the 142*l.* from the 337*l.*

Held that, on these facts, plaintiff was entitled to a verdict on the issues on both replications.

FIRST count, on bill of exchange for 337*l.* 1*s.* 10*d.*, drawn by plaintiff on, and accepted by, defendants. Second count, for money paid. Third count, for interest. Fourth count, on accounts stated.

*Plea.—1. Denial of acceptance. Issue thereon.

2. Release of the causes of action in the declaration mentioned [*796 by deed of 14th February, 1855, executed by plaintiff.

Replications to plea 2.—1. That the deed is not the deed of plaintiff. 2. That in the deed a blank was left for the amount of plaintiff's debt, which, after the execution of the deed, was filled up with erroneous

(a) The Court of Queen's Bench sat in banc on June 20th and 21st, and, for the purpose only of delivering judgments, on 3d July.

particulars, without the knowledge of plaintiff, and which particulars have never been ratified by plaintiff. Issue on both replications.

The plaintiff, in his particulars of demand, claimed 203*l.* 4*s.* 7*d.* on a balance of account.

On the trial, before Martin, B., at the Liverpool Spring Assizes, 1856, it appeared that the defendants accepted the bill in question, which was drawn on 12th October, 1854, payable six months after date. That afterwards plaintiff purchased from defendants timber to the amount of 142*l.* 9*s.* 7*d.* (for which he gave credit in his particulars). Afterwards, on 31st January, 1855, a meeting of defendants' creditors was held, to which plaintiff was summoned; he was unable to attend in person, but sent a clerk with orders to assent to what the others agreed to. At this meeting, it was agreed that all the effects of defendants should be made over to the father of the defendant Abbinett, who was himself a creditor, and that he should secure to the creditors 10*s.* in the pound. The deed of composition was afterwards drawn up, which recited that defendants were indebted to the several persons parties thereto in the sums set opposite to their respective names in the schedule; by it the stock in trade and effects were assigned to trustees; and the father of the defendant Abbinett covenanted to pay to the other *797] *creditors, parties thereto, 10*s.* in the pound; and the creditors, parties thereto, covenanted with defendants not to commence any action or suit, &c., against defendants, for or by reason of any debt or debts then owing by defendants to them or either of them, and that, in case such action, &c., should be commenced, the defendants might plead those presents as a general release in bar. This deed was, on 7th February, brought to the plaintiff for execution by him, by an accountant, named Chalmers, who had been employed in the transaction. The plaintiff executed the deed; but no amount was placed in the schedule opposite to his name. Afterwards, Chalmers inserted the sum of 337*l.* 1*s.* 10*d.* in the schedule, without the knowledge or authority of plaintiff. Chalmers, who was examined at the trial, deposed that he took this sum from defendants' books, without debiting plaintiff with the timber; but he added that he ought to have so debited plaintiff; and that he, Chalmers, acted on behalf of the principal creditors and the defendants. The jury found that the intention of the parties was that the debt from defendants to plaintiff should be taken to be the balance due from defendants to plaintiff, after deducting the amount of the purchase of timber. The learned Baron directed a verdict for the plaintiff, on the replication of Non est factum; and he also desired the jury to find for the plaintiff on the issue on the second replication, if they believed that plaintiff's meaning was to accept a composition on the balance only. The jury having found that this was plaintiff's meaning, a verdict was taken for the plaintiff on all the issues, with leave reserved to move as after mentioned.

In last Easter Term, *Atherton* obtained a rule for *entering a verdict for the defendant, "on the ground that the learned Judge, [*798 before whom the cause was tried, misdirected the jury in directing them to find a verdict for the plaintiff on the replication of Non est factum, because of the insertion, by Mr. Chalmers, of the amount of the plaintiff's debt at the foot of the composition deed; also on the ground that the Judge misdirected the jury in directing them to find their verdict for the plaintiff on the second replication to the plea of release, if they believed the evidence of Mr. Chalmers with reference to the plaintiff's execution of the composition deed, but also believed that the plaintiff intended, in his own mind, to accept a composition on the balance only of the debt due to him after setting off the damages due from the plaintiff to the same bankrupt."

Hugh Hill and *Quain* now showed cause.—First, as to the issue upon the first replication, Non est factum. Upon this the plaintiffs are entitled to a verdict. The recital in the deed is a material part of it, inasmuch as it explains what debts the deed is intended to release, namely, the several sums of money set opposite to the respective names of the creditors in the schedule. No sum is set opposite the plaintiff's name at the time of execution; the release, therefore, is inoperative as regards him. Weeks *v.* Maillardet, 14 East, 568, is an authority to show that a defence of this nature may be raised under the plea of Non est factum. Pigot's Case, 11 Rep. 26 b, also is in point. The release, though a valid instrument as regards the other creditors, was, as regards the plaintiff, no instrument at all, the sum released not being inserted *at the time of the execution of it by the plaintiff, but [*799 filled in afterwards, without his authority; Hibblewhite *v.* M'Morine, 6 M. & W. 200;† Com. Dig. *Fait*, (A 1); Hudson *v.* Revett, 5 Bing. 368 (E. C. L. R. vol. 15). In this last case the filling up a blank in the deed after execution was held not to make the deed inoperative, the obligor having recognised it in several ways after the alteration had been made; but the case shows that an alteration, of the same nature as that in the present case, is a most material one; however, as the party who altered here was acting (as appeared upon the trial) for the defendants amongst others, the deed would be void whether the alteration was in a material part or not; Pigot's Case. Davidson *v.* Cooper, in Exch. Ch. 13 M. & W. 343,†(*a*) is also a strong authority for the plaintiff. There the instrument itself was not altered; the mere affixing of a seal to it was held to make the instrument inoperative. [CROMPTON, J.—In all these cases it was admitted that there was a valid execution by the maker of the instrument in the first instance; here you contend that the deed never operated at all.] Harrhy *v.* Wall, 1 B. & Ald. 103, will be relied on by the other side. But, even if that case be held to

(*a*) Affirming the judgment of Exch. in Davidson *v.* Cooper, 11 M. & W. 778.† See Burchfield *v.* Moore, 3 E. & B. 683 (E. C. L. R. vol. 77).

govern the present, so far as to make the deed operate whilst there was a blank, still the question remains, what was the amount of the defendants' "debt" released by the deed? It was clearly not the amount of the bill of exchange, but that amount less 142*l.* 9*s.* 7*d.* due from the plaintiff to the defendants. [WIGHTMAN, J.—The jury found that this was the amount of the defendants' debt. *Atherton.*—They found only that this was what the plaintiff intended should be meant by the word.] *In Harrhy *v.* Wall there was not an erroneous amount of debt set down, but merely a blank left; and the deed was held to be operative as to the real amount of debt due. But here a wrong amount is inserted; and it cannot be held that the deed is operative as to that. That is also the distinction between the present case and Daniel *v.* Saunders, 2 Chitt. 564, which will probably be relied on for the defendants. And the particular amount released, even supposing the deed to operate as a release on the part of the plaintiff at all, is properly put in issue by the replication of Non est factum; North *v.* Wakefield, 13 Q. B. 536 (E. C. L. R. vol. 66). West *v.* Steward, 14 M. & W. 47,† will probably be relied on. But the deed in that case was held not to be rendered inoperative by the alteration, upon the principle that the property assigned by it, having once passed, could not be devested by any subsequent alteration of the instrument. But the deed here is really a covenant not to sue; and that covenant is certainly rendered inoperative by the alteration. [CROMPTON, J.—A covenant not to sue, which is to operate as a release, is the same thing as an actual release.]

*800]

Atherton and *Brett*, contrà.—The covenant not to sue is clearly intended to operate as a release. The amount of debt released, therefore, would be the amount for which the plaintiff could have brought his action. That would be the amount of the bill of exchange, not merely the balance of the whole account. But for the statute of set-off, cross actions must have been brought upon the two cross claims. The parties might have arranged, before action, that the plaintiff should sue *only for the balance; but, no such arrangement having been made, he would clearly bring his action for the whole amount of the bill of exchange. [ERLE, J.—If the plaintiff had made an affidavit that the defendants were indebted to him in that amount, taking no notice of the set-off, and the defendants had been arrested, the plaintiff would have been liable for arresting them for what was not the real debt.] That case comes within the equity of the statute by virtue of the statute of set-off: it is an arrest for more than the plaintiff could recover. But the party could not be indicted for perjury on the ground that he had sworn to the whole debt without allowing the set-off. The statutes of bankruptcy in express terms make the balance the debt. The plea states that the plaintiff released to the defendants "the causes of action in the declaration mentioned:" if that is the claim upon the

*801]

bill of exchange the defendants are entitled to a verdict upon the issue raised by the replication of Non est factum; if, on the other hand, the balance is the debt due, the release is good for that amount, and therefore even then the defendants succeed pro tanto upon the plea of release. [CROMPTON, J.—The defendants have pleaded to the whole of the declaration.] They might have pleaded, as to part, Never indebted; as to the remainder, the release. The deed was certainly effectual as a release, though the precise sum released may have been, at the time, not ascertained and fixed by the deed itself. It was a perfect deed. In Weeks *v.* Maillardet, 14 East, 568, the deed, as the Court observed, was insensible until the schedule was annexed to the deed; that is not so here. In *Hibblewhite *v.* M'Morine, 6 M. & W. 200,† the deed was insensible and imperfect upon the face of it, the vendee's name not being inserted. Hudson *v.* Revett, 5 Bing. 368 (E. C. L. R. vol. 15), is no authority either way; in that case there were circumstances which amounted to a re-execution and confirmation of the deed by the obligor. Harrhy *v.* Wall, 1 B. & Ald. 203, and Daniel *v.* Saunders, 2 Chitt. 564, are not distinguishable from the present case. The question, how far the recital controls, or is controlled by, what follows, is illustrated by Charleton *v.* Watson, 3 Q. B. 693 (E. C. L. R. vol. 43), and Graham *v.* Ackroyd, 10 Hare, 192. [*H. Hill* referred to Payler *v.* Homersham, 4 M. & S. 423 (E. C. L. R. vol. 30).] As to [*802

the second replication, to make it good it must be considered as an argumentative Non est factum; Cospy *v.* Turner, Cro. Eliz. 800; and then the argument as to the other issue applies.

(COLERIDGE, J., was absent.)

WIGHTMAN, J.—It appears to me that this rule ought to be discharged. On the 14th February, 1855, the date of the deed, the position of the parties was as follows. The defendants were indebted to the plaintiff in 337*l.* 1*s.* 10*d.*, on the bill of exchange; and the plaintiff was indebted to the defendants in 142*l.* 9*s.* 7*d.*, for timber: the balance on that would be 194*l.* 12*s.* 3*d.*, which would thus be the sum in which the defendants were indebted to the plaintiff. On that day the composition deed is drawn up; and, by covenant, in consideration of the guarantee of 10*s.* in the pound, the plaintiff and the other creditors release defendants from *any debt or debts then owing to them: and, though this, the early part of the covenant, amounts only to a covenant not to sue, yet afterwards it is stipulated that the deed may be pleaded as a release. There is therefore no doubt, and indeed there was hardly any point made as to this, that the deed amounts to a general release in respect of any debt on which an action might be brought. Now the indenture recites that the defendants were indebted to the parties in the sums set opposite to their names in the schedule. It appears that a blank was left opposite to the name of the present plaintiff in the schedule, which blank was afterwards filled up with the sum of 337*l.* [*803

1*s.* 10*d.*, no deduction being made in respect of the 142*l.* 9*s.* 7*d.*: the result of which would be that the defendants might recover from the plaintiff the whole of the 142*l.* 9*s.* 7*d.*, while the plaintiff would only get 10*s.* in the pound upon the 337*l.* 1*s.* 10*d.*, a loss which he would have avoided had the balance been inserted in the schedule; and the plaintiff would then have received 10*s.* in the pound on that balance. When the deed was executed, no sum was mentioned as the debt due from the defendants to the plaintiff. The effect would be that the deed would release all such debts as were then due from the defendants to the plaintiff: that is the way Mr. *Atherton* presents the case; and so I take it. There was a release of all debts then due. The question is, what was the amount of debt on which the release was to operate? There can be no question but that that amount would be the balance of 194*l.* 12*s.* 3*d.*, upon which the plaintiff would receive the 10*s.* in the pound. But, without the consent of the plaintiff (I leave out of consideration the time of the insertion, which I agree *with Mr. *Atherton* in thinking not very material), the whole sum of 337*l.* 1*s.* 10*d.* is inserted, leaving it open to the defendants to demand the whole 142*l.* 9*s.* 7*d.* Then the defendants plead this deed as a release of the whole claim in the declaration, not as a release of the balance: and the question is whether the deed is such release as they have pleaded. Suppose the sum were still to be left in blank, and to be ascertained by the jury; the jury find that the real debt meant was the balance left, after deducting the set-off in respect of the timber: they take into consideration what was the plaintiff's view of the case at the time that he executed the release. The debt was the debt due to the plaintiff; what was it he claimed against the defendants? If he had regard to his own interest, he would claim only the balance of 194*l.* 12*s.* 3*d.*, because he would then get the benefit of having his debt to the defendants set off in full. It must be taken that this was the understanding of all parties: the finding of the jury is conclusive: and no objection is made to it as not warranted by the facts. The question was quite within their province. Then the replication of Non est factum denies that the whole debt of 337*l.* 1*s.* 10*d.* was released; and on that there must be a verdict for the plaintiff. It seems to me, also, that the second replication is substantially proved, and is not open to the objection that Mr. *Atherton* makes. He says it is merely an informal Non est factum. But what it does state is only that there was a blank left which was inaccurately filled up without the authority of the plaintiff; whatever amount was inserted, the deed would still be a release; so that the replication does not appear to me to amount to Non est factum: and the verdict upon it should stand.

*804]

*805] *ERLE, J.—I also am of opinion that this rule should be discharged. The question is, whether the plaintiff released the whole of the debt sought to be recovered. The evidence is, that the

defendants owed to the plaintiff 337*l.* 1*s.* 10*d.* on their acceptance, and plaintiff owed to defendants 142*l.* 9*s.* 7*d.* for goods sold by them to him after the acceptance. For the purpose of this rule, I take it that the deed was executed in blank, and that it released the whole of the debt then owing to the plaintiff. Was that a release of the whole 337*l.* 1*s.* 10*d.*, which in one sense was the legal debt owing to the plaintiff from the defendants, or was it a release of the balance? I am of opinion that, in common parlance, the debt is what is due after allowing for the counter claim. Suppose A. has a claim upon B. for 5010*l.*, and B. a claim on A. for 5000*l.* If A. were to give out that B. owed him 5010*l.*, he would be saying that which, in mercantile understanding, was not true. I should say that here the deed must be interpreted according to the meaning of the party executing it: and, if so, the debt which he released clearly was the balance. I put this on the supposition that the deed is executed in blank. Then the question is, whether the defendants can force the plaintiff to pay for the timber in full, and accept the composition on the whole 337*l.* 1*s.* 10*d.*; that is what the defendants assume to do. I admit that the deed is a release. The defendants plead that it covers the whole claim in the declaration. They might have pleaded it as a release of the excess above the price of the timber; but they do plead it as a release of the whole 337*l.* 1*s.* 10*d.* In fact, however, the deed has been altered by the insertion of the sum of 337*l.* 1*s.* 10*d.*, without the authority of the plaintiff. Either that *avoids the deed, or it misrepresents the legal amount of the debt. The replication of Non est factum is therefore clearly [*806 established: the plaintiff did not, in legal effect, release the whole sum which he claims in the declaration. It stands in the evidence that neither the plaintiff nor the defendants so understood the release. As to the second replication, I think it substantially proved: but in truth the first point is the material one.

CROMPTON, J.—I am of the same opinion. Whether we look to the intention of the parties or to the operation of the deed, it is manifest that the balance is what was meant to be released. There is clear evidence that the plaintiff so meant, and that Chalmers also intended to insert the balance arising on all the transactions between the plaintiff and the defendants. The very nature of such deeds is to make the parties free men; and that is what our construction of the release will effect. It would be the strangest thing possible in the mercantile world if, when there was a debt of 10,000*l.* on one side and of 9000*l.* on the other, the debt was understood to mean all on one side and nothing on the other. When the defendants say that they are indebted to several creditors, they do not mean that all is to be taken into account on one side and nothing on the other, that they are indebted only on one side of the account: such a statement would be fraudulent, and would be an unfair mode of dealing with creditors who are parties to the composition. The

question here raised is, whether the release, according to the intention of the parties, was a release of the debt due on one side only, or of the balance. It was quite open to the jury to decide that. The deed is not avoided by a blank having been originally left in the schedule; *807] *but the question is then left open to proof, which debt was meant. I think therefore that the direction of my brother Martin as to the issue on Non est factum was right. I feel more difficulty as to the other replication: but I think the rest of the Court is right in saying that it was made out. I should rather construe it as a bad plea in avoidance. The rule will be discharged.

Rule discharged.(*a*)

(*a*) See note (*b*) to Mathews *v.* Taylor, 2 Man. & G. 673 (E. C. L. R. vol. 40).

The QUEEN *v.* The Churchwardens of the Parish of SAINT MICHAEL, SOUTHAMPTON, *June* 21.

Stat. 58 G. 3, c. 45, s. 59, authorizes the churchwardens of any parish, with the consent of the vestry and of the bishop and incumbent, "to borrow and raise, upon the credit of the rates of any such parish, such sum or sums of money as shall be necessary for defraying the expense or any part of the expense of enlarging or otherwise extending the accommodation in the then existing churches or chapels of such parish; and to make rates for the payment of the interest of such sum or sums of money so to be borrowed and raised, and for providing a fund of not less than the amount of the interest upon the sum advanced for the repayment of the principal thereof, or for repaying such principal in such manner and at such times and in such proportions as shall be agreed upon with the persons advancing any such money."

On 22d June, 1826, the vestry of a parish passed a resolution to enlarge the parish church, to approve the estimate of the contractors for the sum of 2390*l.*, and to borrow the money necessary for the plan, beyond the sum already raised, upon bonds of 50*l.* each, bearing 5 per cent. interest. On 7th December, 1826, the vestry passed another resolution, authorizing the churchwardens, with the assistance of a committee, "to borrow at interest any sum or sums of money not exceeding 2000*l.*" for the payment of such expenses. The resolution further declared that, "in order to secure the repayment of such money so borrowed," the churchwardens for the time being should, from time to time, make such rates as should be necessary for payment of interest on such debt, and not less than 5 per cent. to accumulate as a sinking fund. The consent of the bishop of the diocese and of the incumbent was given to this resolution. The work was done by the contractors between 29th June, 1826, and 29th March, 1830. A sum of 400*l.* then remained due to the contractors; and the then churchwardens agreed that this sum should be treated as a loan from the contractors to the parish; and they executed four deeds of charge upon the rates of the parish, for the sum of 50*l.* each, at 5 per cent. interest, payable on 31st March, 1831, and expressed to be in part liquidation of the debt. Interest was regularly paid on the bonds until after March, 1850; but no demand was ever made by or on behalf of the obligees that any fund should be provided for the payment of the principal; nor had any such fund been provided.

On mandamus to the churchwardens for the time being to make rates for the purpose of paying to the executors of the obligees the principal and the arrears of interest upon the bonds,

Held: 1. That the consent of the committee to the borrowing, or quasi borrowing, of the 400*l.*, if essential to the validity of the bonds, might be presumed, although it did not appear upon the face of the instruments.

2. That the transaction amounted to a "borrowing" within sect. 59; and that the bonds were to be considered as given to secure, not a past debt, but a present loan.

3. That the liability of the rate-payers under the bonds was not destroyed by the obligee having failed, during 20 years, to demand that they should provide a fund for payment of the principal.

MANDAMUS. The writ suggested that, on 22d June, 1826, it was

resolved by the vestry of the *parish of St. Michael, Southampton, to enlarge the accommodation in the parish church: that [*808 the churchwardens were "duly authorized and directed" by the vestry to borrow and raise at interest, under the provisions of stat. 58 G. 3, c. 45,(a) the sum of 2000*l.* for the purpose of defraying the expense of such enlargement: that the consents respectively of the vestry, the incumbent and the bishop "were then, pursuant to the said Act, duly signified, expressed, and given" to the borrowing of the said money in manner aforesaid: that the accommodation in the church was accordingly enlarged: that certain work was done, and materials were provided, by James Hayter and John Foot, at the request of the vestry, in and about such enlargement: that, at the time of the giving the deeds thereinafter mentioned, 400*l.* was due from the parish to Hayter and Foot in respect of the said work and materials; that it was thereupon agreed by the vestry, with the consent of Hayter and Foot, that the said money so due should be regarded as a loan by Hayter and Foot to the parish, and as a portion of the said sum of 2000*l.* which the churchwardens were authorized to raise as aforesaid: that the payment of the said 400*l.* should be secured by six deeds of charge upon the rates of the parish, two for 100*l.* each, and the remaining four for 50*l.* each; and that, on 29th March, 1830, four deeds of charge for 50*l.* each were executed *by the churchwardens. The writ then set out [*809 the form of the deeds, which recited, among other things, that the parish was "indebted" to Foot and Hayter "in the sum of 400*l.* and upwards for work done and performed, and materials found and provided for them, in and for the improvement and enlargement of the church of the said parish," under a contract made 29th June, 1830, between them and the then churchwardens; and that, at a vestry meeting on 25th February, 1830, it was resolved that Foot and Hayter should receive bonds to the amount of 400*l.*, "in part liquidation of their account." The consent of the bishop and incumbent was not recited. The deeds provided that the principal should be repaid on the 29th March, 1831, with interest at five per cent.

The writ further suggested the death of Hayter, and the subsequent death of Foot, who appointed Mary, now the wife of George Degee, his executrix; and that the principal moneys secured by the said bonds, together with certain arrears of interest, were unpaid; and commanded the churchwardens out of the funds in their possession and control applicable to that purpose, to pay to the said George Degee and Mary Degee the said principal and interest; and, if they had no such funds, or not sufficient to pay the whole, to raise, by a rate upon the parish, a sum sufficient for the purpose.

The return to the writ stated that the churchwardens had not, in their possession and control, funds applicable to the purpose of paying

(a) "For building and promoting the building of additional churches in populous parishes."

the said principal and interest; and, as to the making a rate for that purpose, stated, at length, the resolutions of the vestry, passed on 22d June, 1826, with respect to the enlargement of the church.

*810] *The material parts of these resolutions were as follows: That new pews and other additions should be made to the church.

That "the estimate of James Hayter and John Foot, amounting to 2390*l.*, be adopted."

"That the pews thus obtained (except two, to be reserved to the vicar) be let, and the proceeds applied to paying off the debt incurred by the parish."

"That whatever sums be necessary for carrying the above plans into effect, beyond the moneys already raised, be borrowed on bonds of fifty pounds each, bearing an interest of not more than five per centum per annum."

"That, to pay off these bonds and interest, the moneys arising from the quit rents and fines of the parish houses shall be applied. The surplus pews shall be let at three guineas each, and a church rate of six pence in the pound, besides the rate for ordinary expenses, shall be collected; and the churchwardens are hereby empowered to collect the same, agreeably to the conditions of" stat. 58 G. 3, c. 45, s. 59.

The return then set out the resolutions of the vestry passed on 7th December, 1826, the material parts of which were as follows:

"That the several resolutions respecting the new pewing, enlarging, and repairing this parish church, made at the vestry meeting held on the 22d day of June last, be approved of and be confirmed."

"That the resolution at the vestry meeting held the 5th day of October last, respecting the taking down and rebuilding part of the north-east wall, be likewise approved of and confirmed."

*811] *"That the contract entered into on the 9th day of June last, with Messrs. John Foot and James Hayter, for the new pewing, enlarging, and repairing the said church, pursuant to the second resolution of the vestry meeting of the 22d day of June last, at the sum of 2390*l.*, be likewise approved of at this meeting. That the contract entered into by the churchwardens with Messrs. Foot and Hayter for repairing part of the north-east wall, pursuant to the resolution in vestry of the 5th day of October last, which they now report to have made, at the sum of 156*l.* 10*s.*, be also confirmed and approved of."

"That, in case a faculty is necessary from the Lord Bishop of Winton's Court legally to authorize such alterations and improvements being made in the parish church, the necessary steps be forthwith taken for obtaining the same."

"That it appears that the sum of 2000*l.* will be wanted to be borrowed at interest, for the purpose of defraying the several expenses attending such alterations and improvements; and that the church-

wardens be authorized, with the assistance of the following committee, or any three of them, to borrow at interest any sum or sums of money, not exceeding 2000*l.*, which may be necessary for those purposes." The names of the committee were then given.

"That in order to secure the repayment of such money so borrowed, the churchwardens of this parish for the time being do, from time to time, make such rates as may be necessary for payment of the interest of such debt, and not less than five per cent. on such principal debt to be laid out at interest to accumulate for liquidation of such principal."

*The return then alleged that "the authority and direction to the said churchwardens of the said parish to borrow and raise money at interest, as in the said writ mentioned, was given in and by the said resolutions at the said meetings respectively, and not otherwise:" and set out the written consent of the vicar to the borrowing of the money. The consent ran as follows: [*812

"I, the Rev. T. L. S., vicar and incumbent of the parish of St. Michael, in the town and county of the town of Southampton, Do hereby signify and declare my consent to the churchwardens of the said parish of St. Michael, in the said town and county, borrowing and raising, upon the credit of the rates of the said parish, the sum of 2000*l.*, for the purpose of defraying the expense of completing the improving and enlarging the church of the said parish, and the accommodation in the same church; and to the making rates for the payment of the interest of the said sum of 2000*l.* so to be borrowed and raised, and for providing a sum of not less than the amount of the interest upon the sum advanced, for payment of the principal thereof, or for repaying such principal in such manner, in such times, and in such proportions as shall be agreed upon with the persons advancing any such sum of money."

The return then set out the consent in writing, under seal, of the Bishop of Winchester. The consent, after reciting that the churchwardens, with the consent of the vicar, were desirous of "borrowing and raising, upon the credit of the rates of the said parish," &c. (following the language of the vicar's consent), and that the churchwardens had applied for the Bishop's "consent to the borrowing the said sum of 2000*l.*, in manner and for the purposes aforesaid, and to the making rates for *payment of the interest of such sum of money so to be borrowed as aforesaid, and also for the repayment of such principal sum to be borrowed in manner aforesaid," declared that the Bishop "doth hereby signify and declare his Lordship's consent to the borrowing of the said sum of 2000*l.*, for the purposes aforesaid, upon the credit of the rates of the said parish of St. Michael, and the making of such rates as aforesaid for the payment of the interest thereof and repayment of the said principal." [*813

The return then alleged that the said work was done and materials provided by Hayter and Foot between 29th June 1826 and 29th March

1830: that before the last-mentioned day the whole of the said sum of 400*l.* had become due to them, "and was then a debt to them as in the said writ mentioned:" and that the said deeds were all executed and delivered on 29th March, 1830: that they were delivered to Hayter and Foot, "not in consideration of any money then lent and advanced by them upon the credit of the rates of the said parish, but solely in payment to them, the said James Hayter and John Foot, of the sum of 2000*l.*, part of the said debt which had been so due and owing to them since a time previous to the said 29th March, 1830, as aforesaid." It further alleged that no agreement was made as to the manner, times, and proportions of paying the amount so charged on the rates: that the rate of interest fixed by the said deeds was five per cent. per annum, or one-twentieth part of the principal amount thereby charged respectively; that the interest on all the said sums of 50*l.* was duly paid up to and until after the 29th March, 1850; and that no demand was ever made by Hayter or Foot, or the survivor, or by Mary Degee,

*814] as such *executrix, or her husband, that any sum should be set apart from year to year for providing a fund for the payment of the said four sums of 50*l.*, and that, in fact, no such fund was ever provided. The return ended by alleging that, by reason of these circumstances, the churchwardens could not comply with the writ by making and raising such rate as was thereby commanded.

Demurrer. Joinder.

The case was argued in last Term.(*a*)

Montague Smith, in support of the demurrer.—The return is no answer to the writ. If the transaction has been conducted according to the provisions of the statute, it is compulsory on the churchwardens to make a rate for the purpose of paying the principal and the arrears of interest upon the bonds; Rex *v.* St. Mary, Lambeth, 3 B. & Ad. 651. But it is contended that no mandamus can issue now commanding them to make a rate for the purpose of satisfying the debt due under these bonds, because it is said, first, that the parties entitled have been guilty of laches in not applying for part payment before: and, secondly, that the bonds are in themselves invalid, inasmuch as they were given for securing, not the repayment of a loan made at the time, under the provisions of statute 58 G. 3, c. 45, but the repayment of a debt contracted previously; and, further, because they do not show the borrowing, even if it can be considered as such, to have been made with

*815] the joint consent of *the committee, the bishop, and the incumbent. As to the first point, stat. 58 G. 3, c. 45, s. 59, declares that "it shall and may be lawful for the churchwardens of any parish, with the consent of the vestry or select vestry, or persons possessing powers of vestry, and with the consent of the bishop and incumbent,

(*a*) May 31st; before Erle, J. Lord Campbell, C. J., and Coleridge, J., were sitting in the Court of Criminal Appeal, Wightman, J., at Nisi Prius, and Crompton, J., at Chambers.

and they are hereby authorized and empowered, to borrow and raise, upon the credit of the rates of any such parish, such sum or sums of money as shall be necessary for defraying the expense or any part of the expense of enlarging or otherwise extending the accommodation in the then existing churches or chapels of such parish; and to make rates for the payment of the interest of such sum or sums of money so to be borrowed and raised, and for providing a fund of not less than the amount of the interest upon the sum advanced for the repayment of the principal thereof; or for repaying such principal in such manner and at such times, and in such proportions, as shall be agreed upon with the persons advancing any such money." This shows that the duty of seeing to the proper repayment of the loan rests with the parish, and not with the creditor; and the postponement by him of his right to claim upon the security cannot be treated by the parish as laches. If the legislature had intended that lapse of time should destroy the creditor's right, the Act would have contained an express provision to that effect. This was one of the grounds upon which the Court based its decision in Rex *v.* Carpenter, 6 A. & E. 794 (E. C. L. R. vol. 33). That case turned upon the construction of Gilbert's Act; but the principle involved was the same as regards the question of laches *by the creditor. As to the second point, it is clear that the debt [*816 to secure which the bonds were given must be considered as being for money borrowed by the parish, within the meaning of the Act. They owed 400*l.* to Hayter and Foot; and, instead of borrowing that amount from a third party, upon the security of bonds, and repaying Hayter and Foot with it, they treat the debt as a loan from Hayter and Foot, and give the bonds to them. That transaction is equivalent to a loan from Hayter and Foot to the parish; and the bonds are not the less bonds given for money borrowed, because the loan was made by Hayter and Foot for the purpose of repaying themselves. As to the objection that the proper consent is not shown, the return shows that such consent was given as is required by the Act.

Hugh Hill, contrà.—First, assuming that the transaction amounted to a loan, a mandamus cannot now go against the parish to enforce payment of the principal. Sect. 59 of the act declares that the principal is to be repaid "in such manner, and at such times, and in such proportions, as shall be agreed upon with the persons advancing any such money." The bonds themselves declare that the principal, in the present case, is to be paid off in March 1831. The creditor has chosen, instead of claiming such payment when it became due, to content himself with receiving the interest; and the present churchwardens are not liable for arrears which accrued through his laches. He should have exercised ordinary diligence in looking to his rights. At all events the present churchwardens cannot be compelled to make a rate to provide for the payment of the arrears, even if they are bound to

*817] answer for such payment in some *way or other; Rex *v.* Carpenter, 6 A. & E. 794 (E. C. L. R. vol. 33). Next, the transaction between Hayter and Foot and the parish was not a loan within the provisions of the statute. First, the bonds were given to secure a debt already incurred; and the statute was not intended to authorize retrospective obligations on the part of the parish. Rex *v.* Dursley, 5 A. & E. 10 (E. C. L. R. vol. 31), and Piggott *v.* Bearblock, 4 Moore P. C. C. 399, are strong authorities on this point; those cases turned upon the construction of stat. 59 G. 3, c. 134, which is in pari materia with stat. 58 G. 3, c. 45, and to which the section authorizing the parish to borrow is in language almost identical with the corresponding section in the latter Act. [ERLE, J.—I do not see that the transaction here was less legal than if Hayter and Foot had actually lent the money to the parish for the purpose of repaying themselves.] Even then the advance would have been made on account of a retrospective debt. It certainly would amount, at the most, only to what might perhaps be called a transaction equivalent to a loan: but the doctrine of equivalents, always a dangerous one, cannot be adopted where the statute prescribes a limited and specific course. Secondly, the authority to give the bonds being entirely the creature of the statute, that authority should be strictly pursued; Rex *v.* Loxdale, 1 Burr. 445, 447: but it does not appear on the face of the bonds that they were given according to the provisions of the statute. Neither the consent of the committee, of the incumbent, nor of the bishop, as required by sect. 59, is alleged. Nor does it appear that the bonds were given with the consent of the committee, as was required by the resolution of

*818] 22d June, 1826. The bonds allege only *a resolution of the vestry, on 25th February, 1830. Nor was such consent, in fact, given. The bishop and incumbent, it is true, consented to the money being borrowed, but not to the giving of the specific security.

Montague Smith, in reply.—As to the question of laches by the creditor, the parish have, from time to time, acknowledged the debt by paying interest, and therefore no laches by the creditor, even if it had taken place, would now destroy their liability; Rex *v.* Carpenter, 6 A. & E. 794 (E. C. L. R. vol. 33), is an authority as to this. It is not necessary that the bonds should show the consent on the face of them. They purport to be made in pursuance of a resolution of the vestry; and it is to be presumed that the resolution was properly made. It is admitted that the consent of the bishop and incumbent was properly given to borrowing the money; and such consent must clearly have been prospective, and have been given, not only to the borrowing, but to the giving the statutory security, which was the necessary result of such borrowing. The consent of the committee was not necessary; the resolution merely provided that they should assist the churchwardens if necessary; and it may be presumed that such assistance was given.

As to the objection that the doctrine of equivalents is a dangerous one where a statute provides for a specific course, here the equivalent transaction answers the intention of the statute; The Bank of England *v.* Anderson, 3 New Ca. 589, 662 (E. C. L. R. vol. 32), shows that any obtaining credit may be included by the Legislature in the word borrow. In that case, as in the present, security given to a creditor for a sum *already due to him was held to amount to a borrowing that sum from him. *Cur. adv. vult.* [*819

ERLE, J., now delivered judgment.

On the return to this mandamus the liability of the parish on the bonds mentioned in the writ has been disputed on several grounds.

First, it was objected that they did not appear to be in conformity with the power granted to the churchwardens to borrow with the assistance of a committee, as there is nothing to show that the committee assisted. But, as the statute gives the power to borrow to the churchwardens with the consent of the vestry, incumbent, and bishop, and as all those parties have concurred, the assistance of the committee, if it was essential, ought to be presumed; especially as the bonds were given with the consent of a vestry assembled for that purpose, probably including the committee, and the interest has been paid on the bonds, as if they were valid, for many years. It was further objected, that the power was to borrow money on the rates, whereas the power exercised was to charge a debt on the rates. But it appears to me that the effect of the transaction, as stated in the bonds, is the same as it would have been if Foot and Hayter had lent the money to the churchwardens, and they had given the bonds for the loan, and had then paid the debt due for work by returning the money to those who lent it. When parties agree that a transaction shall have the same result as would exist if money had passed and repassed from one to the other, it has been decided that this agreement is to be carried out by the law. These decisions are salutary, as they give effect to the intention *of the parties; and I consider them to support the validity of these bonds, as far as this objection is concerned; Hart *v.* Nash, [*820 2 C. M. & R. 337,† Hooper *v.* Stevens, 4 A. & E. 71 (E. C. L. R. vol. 31), Turney *v.* Dodwell, 3 E. & B. 136 (E. C. L. R. vol. 77). It was further objected that these bonds were to secure a past debt, and were retrospective, and therefore void, according to Rex *v.* Dursley, 5 A. & E. 10 (E. C. L. R. vol. 31), where the repairs were done in 1825 and 1826, and the resolution to borrow, to pay the debt due for them, was come to in 1831, and the bonds were given in 1832. It is important, on account of the rate-payers, that the principle of this decision should be maintained; but the facts there do not seem to me to make it applicable to the present case. Here the resolution of the vestry to make the alterations, and to borrow if need should be, was come to in June, 1826; and the resolution to accept the contract of Messrs. Foot and

Hayter to do the work for 2300*l.*, and to borrow 2000*l.* on the rates, was made in December, 1826; and the consents of the incumbent and bishop were given early in 1827; and the work was done between 29th June, 1826, and 29th March, 1830; and the bonds were given on 27th March, 1830, to deduct 400*l.*, the balance which then had accrued due to Messrs. Foot and Hayter on completion of their contract. The resolution to borrow ought not to be acted on before the money is wanted for payment of the charge to which it relates: any loan before that time would be a waste of interest. The 400*l.* here secured appears to be the last instalment of the contract for 2300*l.*; and there is nothing to show that the payment was not made as soon as it was due in the ordinary and regular course of business. It was therefore a loan to *pay, not a past debt, as described in Rex *v.* Dursley, but a present debt as soon as it became due.

*821]

Fourthly, it was objected that the principal ought to have been paid off at least in twenty years; that it was the duty of the obligees to see that this was done, and that they have forfeited their right of recovery against the present rate-payers by reason of their omission in this respect. But it seems to me that this objection also fails. Stat. 58 G. 3, c. 45, s. 59, suggests that at least one-twentieth of the principal should be raised by rate annually; but it does not require that the bond should be in that form; neither does it create any duty in the obligee to attend to that suggestion. In case of future legislation, justice towards the future rate-payers seems to require that the bond should require the obligee either to enforce payment of part of the principal annually, or to lose it; but it has not done so by the enactment in question. All interest was paid down to 29th March, 1850; but all the principal and the interest accruing after that time is now claimed to be due. In the case of an ordinary bond the debt would remain; and in the case of a bond making a charge on rates it seems to be laid down, in Rex *v.* Carpenter, 6 A. & E. 794 (E. C. L. R. vol. 33), that the obligee has not the duty to compel the parish officers to make an annual provision for the reduction of the principal. There the bond was given in 1807, under stat. 22 G. 3, c. 83, charging the poor-rates and making no provision for repaying the principal; stat. 42 G. 3, c. 74, had empowered the guardians to pay off a part of the principal of such bonds annually; and stat. 43 G. 3, c. 110, required them annually to do so; *so that, in 1807, it was the clear duty of the obligors to pay off a part of the principal annually: and they paid only the interest, without any principal, down to 1836. Nevertheless it was held that the whole of the principal remained due; and a mandamus was granted to enforce that duty. No valid distinction between that case and the present has ever been pointed out: and this decision appears to me to be an answer to the objection now under consideration.

*822]

Peremptory mandamus awarded.(*a*)

(*a*) Reported by Francis Ellis, Esq.

The QUEEN *v.* JOHNSON LIGHTFOOT. *June* 21.

A summons duly issued by a justice against the putative father of an English bastard child was served on the putative father in Scotland, where he had gone to reside. He did not attend before the justices in petty sessions. On proof of this service in Scotland, and that it was in sufficient time to have enabled the putative father to attend, the justices heard the case and made the filiation and maintenance order.

The order having been brought up by certiorari,

Held, by Coleridge, Erle, and Crompton, Js., that service out of England and Wales was not due service under stat. 7 & 8 Vict. c. 101, ss. 2 and 3; and the order was quashed. Lord Campbell, C. J., dissentiente.

R. HALL had obtained a rule Nisi to quash an order of filiation and maintenance made at petty sessions in the West Riding of Yorkshire. The objection raised by the affidavits was that the summons was not properly served. The following statement of the facts appearing on the affidavits is taken from the judgment of Lord Campbell, C. J. "On the 31st day of October, 1853, Jane Jackson, then residing within the petty sessional division of Osgoldcross, in the West Riding of the county of York, having been there delivered of a bastard child, within twelve calendar months, made application to *Robert Buchanan, Esq., one of her Majesty's justices of the peace for the West Riding, and acting for the said division, for a summons to be served upon Johnson Lightfoot, whom she alleged to be the father of this child. The said justice thereupon issued his summons to the said [*823 Johnson Lightfoot to appear at a petty session, to be holden at Pontefract for this division, on the 17th of November following, to answer her complaint touching the premises. Johnson Lightfoot, a British subject, who had recently been living at Castleford within the said division, in the said West Riding, was then living at Portobello, near Edinburgh, in Scotland, where he had gone to reside for the purpose of carrying on his business of a glass bottle manufacturer; and he had then no place of abode in England. He was personally served with the summons at Portobello, on the last day of October or the 1st of November, in time to have enabled him easily to have appeared, in obedience to the summons, at Pontefract on the 17th of November. However he did not appear, nor did any one on his behalf appear, at the petty session then and there held. At such petty session two justices, on proof of the service of the summons as above stated, and on the evidence of the mother, corroborated in material particulars by other testimony to the satisfaction of the said justices, adjudged the said Johnson Lightfoot to be the putative father of such bastard child, and made the order of bastardy appealed against."

In last Trinity Term,(a) *Dearsley* showed cause, and *R. *Hall* [*824 was heard in support of the rule. The argument is omitted, as its course sufficiently appears from the judgments.

Cur. adv. vult.

(a) June 4th, 1856. Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, Js.

CROMPTON, J., now stated that Coleridge and Erle, Js., concurred with him in thinking that the rule must be absolute to quash the conviction; but that Coleridge, J., not having had an opportunity of perusing the judgment he was about to read, its reasoning must be considered as that of Erle, J., and himself only. His Lordship then read the following judgment.

I think that the service in Scotland of a summons in bastardy is not sufficient to support an order made on the non-appearance of the putative father. By stat. 7 & 8 Vict. c. 101, s. 75, the Act is to extend only to England and Wales; and Scotland, for the purposes of the Act, may be taken as a foreign country; and the question really is, whether service in a foreign country is sufficient. I think that the summons and the service of the summons are in the nature of process, and of a proceeding in the bastardy cause, and that it has no force beyond England and Wales.

I think the service mentioned in the Act must mean a service in England and Wales. If the Act had not been limited to England and Wales, it would probably have been deemed, as an Act of the United Kingdom, to have had operation as to procedure in the United Kingdom only. I know of no instance of process being sufficiently served in a foreign country except under the special provisions of some statute; and I do not think that it can have been intended to compel parties to come from a foreign country under such summons. If service *825] *in Scotland would be sufficient, I see no reason why a person may not be served in Australia. The statute says that the summons shall be served six days at the least before the petty sessions; and it must be for appearance at a petty session to be holden at the expiration of six days at the least from the hearing the application. I cannot think that it would be within this enactment to serve a person in Australia with a summons for a petty session to be holden in a year; and I think that the number of days tends to show that the Legislature were contemplating the service within the realm of England and Wales. I think, therefore, that the statute should be construed as providing for procedure and service in England and Wales only; and that, there being no service of the summons within the country to which the Act extends, the adjudication must be taken as made without service of the summons; and, consequently, that the order is bad.

Lord CAMPBELL, C. J.(*a*)—The only serious objection to the validity of this conviction rests on the sufficiency of the service of the summons. By stat. 7 & 8 Vict. c. 101, ss. 2 and 3, it is enacted, That the mother of a bastard child may "make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of such child;"

(*a*) This judgment was read by Erle, J.

"and such justice of the peace shall thereupon issue his summons to the person alleged to be father of such child to appear at a petty session to be holden after the *expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts," and that "on the appearance of the person so summoned, or on *proof that the summons was duly served on such person*, or left at his last place of abode six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father; and if the evidence of the mother be corroborated in some material particular by other testimony, to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child;" &c. His Lordship then stated the effect of the affidavits, as ante, p. 822, and proceeded as follows. [*826

I am of opinion that the summons was "duly served," and that the order is valid. There seems to be no doubt that the summons was duly issued. To give jurisdiction to the justice who issued it, the statute does not require as a condition that the alleged putative father should then have been residing within the division, or within any county, city, borough, or place in England, although he must either have been resident within the Queen's allegiance, or have been a native born British subject, and so bound to obey the laws of the United Kingdom. Still, to give the justices at the petty sessions, held on the 17th of November, jurisdiction to hear the case and to make the order, the summons must have been proved before them to have been "*duly served*" on Lightfoot. If the language of the statute had been "on proof that the summons was *personally* served" I should have had no doubt that proof of a personal *service at Portobello, in ample time to enable him to attend the petty sessions at Pontefract on the 17th of November, had he been so inclined, would have been sufficient. This controversy seems to me to bear no resemblance to the cases depending upon questions as to the jurisdiction of courts over causes of action arising beyond the territory over which their process runs. The matter here in dispute was entirely of a civil nature, viz., the obligation to maintain a child; and the defendant might have been examined as a witness on his own behalf. The cause of action did arise within the district over which the justices had jurisdiction: and the only condition required to enable them to hear the case and to make the order was that Lightfoot should be duly served with the summons. He being a British subject, had the service been at Boulogne or Ostend in ample time to enable him to appear at the petty session, in person or by his agent, I should have thought the service sufficient. The condition on which the justices are to have jurisdiction is not only literally, but is substantially, complied with by this personal service. We must likewise bear in mind [*827

that although the party summoned do not appear he commits no offence, he incurs no forfeiture. He is not compelled to come to the petty session, but is allowed to appear by his agent and to offer any evidence for the purpose of showing that he is not the father of the child; and, should he not appear, either in person or by his agent, there is no reason to suppose that injustice will be done; for judgment does not pass against him by default; and still the justices can only adjudge him to be the putative father of the child on the evidence of the mother, corroborated in some material particular by other testimony *to their satis-*

*828] *faction.* *But great injustice might be done, particularly in the counties of England bordering on Scotland, if the father of a bastard child, by residing for twelve months in a parish in Scotland adjoining the parish in England in which the child was begotten and born, might defy the law and throw the burden of maintaining the child entirely on the unfortunate mother. If the service in Scotland would have been good, *personal* service being required by the statute, I think personal service is equally good, the statute saying, "on proof that the summons was duly served on such person;" for *personal service* must be *due service* wheresoever it may take place, supposing always that the party served may conveniently comply with it; and this qualification answers the objection that the service may be at Rome or in Australia. Here an interval of seventeen days was allowed to intervene between the date of the summons and the petty sessions at which the hearing was to take place; and this interval, according to circumstances, might be extended so as to give a sufficient opportunity to the party summoned to appear either in person or by his agent. If such an opportunity was not proved to have been given, the summons would not have been duly served, and the justices would not have had jurisdiction to make the order. In supposing that, under the circumstances of this case, it was the intention of the Legislature that the justices should have jurisdiction, I can see nothing contrary to the principles of general jurisprudence, or the analogies by which we ought to be guided. By the common law of England in respect of a cause of action arising in England, an English subject might have been sued and outlawed, without process being served upon him. Upon a cause of

*829] *action arising in Scotland, the Court of Sessions has jurisdiction to proceed and adjudicate, without personal service of any summons, after the defendant has been required to appear by public proclamation at the cross of Edinburgh and the pier of Leith. I do not think it necessary to give any opinion upon the construction of the Bankrupt Act 12 & 13 Vict. c. 106, s. 251, as to a bankrupt not surrendering after notice of the adjudication served upon him personally, or left at his usual or last known place of abode or business, or to consider the cases where a person, on not obeying a summons requiring personal appearance, is liable to be arrested and imprisoned under a warrant, as

such cases must be governed by considerations essentially different from the present, where the object of the summons is only to enable the magistrates at petty sessions to inquire into the paternity of the child, and the party summoned may protect himself without personal attendance. I must notice, however, the argument arising from sect. 75 of stat. 7 & 8 Vict. c. 101, which enacts "that this Act shall extend only to England and Wales." But this is evidently intended merely to prevent the Act from having a general operation over the United Kingdom with regard to "the laws relating to the poor," and can have nothing to do with the incidents of a proceeding before English petty sessions respecting the maintenance of a bastard born in England.

For these reasons I am of opinion that the conviction is lawful, and ought to be affirmed: but, my learned brothers being of a contrary opinion, the conviction must be quashed. Order quashed.

*SAMUEL DULY *v.* CHARLES SHARWOOD. *June* 21. [*830

Plaintiff was appointed, by the justices of the county of S. in Quarter Sessions, inspector of weights and measures, for a district comprising the town of B. Subsequently the town of B. was incorporated, and obtained a grant of a separate court of quarter sessions. The recorder of B., in Quarter Sessions for B., appointed defendant inspector of weights and measures. The justices for the borough of B. in petty sessions appointed the plaintiff inspector.

On a case stated without pleadings, in which the question was whether the appointment was in the Recorder in Quarter Sessions, or the justices of the borough in petty sessions:

Held, that it was in neither, but in the Quarter Sessions for the county of S., in virtue of whose appointment the plaintiff recovered.

THIS was a case stated for the opinion of the Court without any pleadings. The town of Brighthelmston (commonly known as and hereinafter called Brighton), was, by stat. 6 G. 4, c. clxxix.(*a*) (1825), placed under the general control and management of a body of commissioners, and so continued until its incorporation by charter in 1854, as hereinafter mentioned: but it does not appear that they had or exercised (except within the market place, the Act requiring them to erect a weighing house in or near the market, and keep proper standard weights and measures to be used by persons selling there on the requisition of buyers) any particular power or supervision with regard to weights and measures.

In or about the year 1826, the inhabitants of the parish of Brighton, under the provisions of stat. 37 G. 3, c. 143 (which relates to weights), and stat. 55 G. 3, c. 43 (which relates to measures), procured proper standard weights and measures for the use of the said parish, and, in pursuance of the said Acts, at a vestry holden *for the purpose, nominated certain persons examiners of weights and measures within the said parish, which persons were subsequently [*831

(*a*) "For the better regulating, paving, improving, and managing the town of Brighthelmston, in the county of Sussex, and the poor thereof." (Local and personal, public.)

appointed to that office by the justices of the peace of the county, acting in petty sessions for the petty sessional division within which the said parish of Brighton was situate. The weights and measures were paid for out of the poor-rates of the said parish, and deposited at the Town Hall (then vested in the Brighton Town Commissioners) under the control of the examiners. The nomination and appointment of examiners for the said parish was annually made in the same manner until the closing of their year of office next after the incorporation of the borough of Brighton as hereinafter mentioned, namely, until the 18th day of May, 1855: and the county justices from time to time fixed the recompense to be made to such examiners for their time and trouble in the execution of their office. Upon the passing of stat. 4 & 5 W. 4, c. 49, the justices of the peace of the county of Sussex, in quarter sessions assembled, in pursuance of sect. 5 of that Act, determined the number of imperial standard weights and measures which they deemed requisite for the comparison of all weights and measures within the said county, and appointed the plaintiff inspector for a district of the said county, coextensive with the petty sessional division within which the said parish of Brighton was situate, and of which it formed part as aforesaid: and under his care one copy of the said imperial standard weights and measures was deposited. By stat. 5 & 6 W. 4, c. 63 (passed 9th September, 1835), the last-mentioned statute was repealed; and by the 17th section it was provided that the justices of the peace of every county, riding or division, or county of *832] *a city, or county of a town, should, at the general or quarter sessions of the peace next after the passing of the said Act, appoint a sufficient number of inspectors of weights and measures, and should allot to each inspector a separate district, and should direct what remuneration should be made to such inspectors. By sect. 25 of the same statute it was provided that in the town of Berwick upon Tweed, and all other places which had been or should be thereafter authorized under the provisions of any Act of Parliament, whether local or otherwise, to appoint inspectors or examiners of weights and measures, and in all other places which had been or should be thereafter, by charter, Act of Parliament or otherwise, possessed of legal jurisdiction, and which had been or should be thereafter provided with copies of the imperial standard weights and measures verified and stamped at the Exchequer, it should be lawful for the magistrates of such places, or for any other persons who might be so authorized as aforesaid, to appoint an inspector or inspectors of weights and measures, within the limits of their respective jurisdictions; and such inspectors so appointed should, within such limits, exclusively have the same powers and discharge the same duties as the inspectors of weights and measures appointed under that Act by the county justices. Under the provisions of the last-mentioned Act, the justices of the peace of the county of Sussex, in quarter ses-

sions assembled, reappointed the plaintiff inspector for the same district as that for which he had been before appointed; and such appointment (except so far as it is affected by the charges and proceedings hereinafter mentioned) continues subsisting. By virtue of such appointment the plaintiff solely stamped all weights and *measures within his district, including the said parish of Brighton, up to the time of his appointment by the justices of the borough of Brighton as hereinafter mentioned; but he never acted in the inspection or examination of weights and measures within the said parish, those duties having been always discharged by the examiners nominated by the vestry and appointed by the justices in petty sessions as before stated. When the said examiners ceased to discharge the duties of their office, the copies of the standard weights and measures, of which they had had the control, were left at the Town Hall in Brighton; and, on the transfer of the property and powers of the Brighton town commissioners to the corporation (on 29th May, 1855), they passed into the hands of the defendant as the town clerk of Brighton, in whose possession they still remain. On the 1st day of April, 1854, Her Majesty's charter of incorporation was, by virtue of the provisions of stat. 5 & 6 W. 4, c. 76, and stat. 7 W. 4 & 1 Vict. c. 78, granted to the town of Brighton; and it became a municipal borough, coextensive with the parish. On the 16th day of December, 1854, a separate Court of Quarter Sessions was granted to the said borough. On the 28th day of December, 1854, a separate commission of the peace was issued for the said borough in accordance with stat. 5 & 6 W. 4, c. 76, s. 98; and the magistrates, who are hereinafter referred to, were thereby appointed justices of the peace for the said borough. In January, 1855, Edwin James, Esq., Q. C., was appointed Recorder of the said borough. By stat. 5 & 6 W. 4, c. 76, s. 105, it is provided that the Recorder of every borough shall sit as sole Judge of the Quarter Sessions of the peace for the said *borough, and such Court of Quarter Sessions of the peace shall be a Court of Record, and shall have cognisance of all crimes, offences, and matters whatsoever cognisable by any Court of Quarter Sessions of the peace for counties in England, and that the said Recorder shall have power to do all things necessary for exercising such jurisdiction, notwithstanding his being such sole judge, as fully as any such last-mentioned Court. Provided, nevertheless, that no Recorder by virtue of his office shall have power to make or levy any county rate, or rate in the nature of a county rate; or to grant any license or authority to any person to keep an inn, alehouse, or victualling-house to sell excisable liquors by retail; or to exercise any of the powers herein specially vested in the council of such borough. On the 19th day of July, 1855, the magistrates of the said borough of Brighton acting under the commission of the peace for the said borough, at a meeting convened for the purpose, appointed the plaintiff

[*833

[*834

inspector of weights and measures within the said borough; since which appointment he (the plaintiff) has ceased to act within the said borough under his appointment as inspector by the county justices as before stated. At the general Quarter Sessions of the peace holden for the said borough on the following day (namely on the 20th day of July, 1855), the said Recorder appointed one Thomas Strutt Stuart inspector of weights and measures for the said borough. The plaintiff subsequently demanded of the defendant the possession of the last-mentioned copy of the standard weights and measures which had been so left at the Town Hall as aforesaid; and the defendant, then and still being
*835] town clerk of the said borough, refused to *deliver them up to him. All the hereinbefore mentioned Acts of Parliament are to form part of the case, and to be referred to by the Court or counsel in the argument. Brighton is not a county of a city or county of a town in itself.

The question for the opinion of the Court is:

Whether the power of appointing to the office of inspector of weights and measures within the said borough was by law vested in the magistrates, or the Recorder of the said borough.

The case was argued in last Easter Term (*a*) by

Foote for the plaintiff, and *Phipson* for the defendant. The only authority cited on either side was Regina *v.* Recorder of Hull, 8 A. & E. 638 (E. C. L. R. vol. 35). The nature of the case renders it unnecessary to repeat the arguments. *Cur. adv. vult.*

CROMPTON, J., now delivered judgment.

We are of opinion that the Recorder had no power to make the appointment in question. He has, by the 105th section of the Municipal Corporation Act, cognisance of all matters cognisable by the Quarter Sessions for counties: and it has been held in Regina *v.* The Recorder of Hull that the jurisdiction under this section applies to the appointment and investigation of the accounts of the inspectors of weights and measures, where there were officers of such a nature within the jurisdiction of the Quarter Sessions of the place, being a county of itself, and throughout the principal part of which the municipal
*836] jurisdiction under stat. *5 & 6 W. 4, c. 76, extended. In Regina *v.* The Recorder of Hull there was an office which was subject, under the Weights and Measures Acts, to the Quarter Sessions of the old city and county; and the Recorder, as the new Court of Quarter Sessions, was held to have that jurisdiction, although the whole of the county was not comprised within the limits of the new corporation. In the present case, however, the office was either one under the justices of the county of Sussex, in quarter sessions assembled, under the 17th section,(*b*) or under the justices out of sessions,

(*a*) April 29th. Before Lord Campbell, C. J., Erle and Crompton, Js
(*b*) Of stat. 5 & 6 W. 4, c. 63.

under the 25th. In neither case is the office of such a nature as that the appointment would vest in the Recorder, who could only take what a Quarter Sessions of the corporation with the powers of a county Quarter Sessions could take, but cannot meddle with an office where the officer is to be either a county district officer or an officer to be appointed by justices out of sessions. From the complicated facts as to the two offices of inspectors and examiners, we have entertained considerable doubt whether the appointment is to be made by the magistrates of the county in petty sessions, or magistrates of the borough in petty sessions, or by the Quarter Sessions of the county: but, upon the whole, we think that the real office was that of a district in the county of Sussex: that the justices of that county in quarter sessions assembled had the appointment; and, consequently, that the plaintiff, who is clothed with that appointment, is entitled to succeed in this action. And we accordingly give our judgment for the plaintiff.

Judgment for the plaintiff.

*The QUEEN *v.* The Justices of WARWICKSHIRE. *June* 21. [*837

Stat. 12 & 13 Vict. c. 92, enacts, by sect. 14, that a party convicted by a justice under the Act shall pay such penalty, damage, or compensation as the justice shall adjudge, order, or award, together with the costs of conviction, to be settled by such justice.

Sect. 25 gives an appeal to Quarter Sessions in all cases where the sum adjudged to be paid on any conviction shall exceed 2*l.*

Held: that this gives an appeal only in cases where the sum adjudged to be paid as penalty, damage, or compensation, exclusive of the costs, exceeds 2*l.*

Therefore, where a party was convicted and adjudged to pay 2*s.* 6*d.* as a penalty, and 2*l.* 7*s.* 6*d.* for costs, and gave notice of appeal, which he afterwards abandoned, and the Sessions made an order upon him to pay a certain sum to the respondent towards his costs in the appeal, this Court issued a certiorari to bring up the last-mentioned order, to be quashed. Though sect. 26 enacts that no order shall be removed by certiorari.

J. W. HUDDLESTON, in last Easter Term, obtained a rule calling on the keepers of the peace and justices in and for the county of Warwick to show cause why a writ of certiorari should not issue to remove into this Court all and singular orders made by them, or some of them, at a Sessions of the peace held at Warwick on or about the 31st day of December last, whereby James Ward (now deceased) was ordered to pay to William Powers the sum of 17*l.* 0*s.* 8*d.* towards his costs occasioned by the said J. Ward having given notice of his intention to appeal against a conviction of him, the said J. Ward, in the said orders mentioned, and entered into a recognisance so to do. At the instance of, &c., the bail of the said J. Ward.

The following facts appeared upon the affidavits.

On 13th November, 1835, Ward was charged before two justices of Warwickshire with having cruelly ill treated a certain animal, to wit, a gelding, the property of William Powers, contrary to the provisions of stat. 12 & 13 Vict. c. 92 ("for the more effectual prevention of cruelty to animals"), and, being convicted, was adjudged "for his said offence

*838] to pay the sum of 2*s.* 6*d.* *as a penalty, and also to pay the sum of 2*l.* 7*s.* 6*d.* for costs, and, in default of immediate payment of the said sums, to be imprisoned" and "kept to hard labour for the space of fourteen days, unless the said sums shall be sooner paid." A moiety of the 2*s.* 6*d.* to be paid to the overseers of, &c., and the other moiety thereof to William Powers, the prosecutor; and the said sum of 2*l.* 7*s.* 6*d.* for costs to be paid to W. Powers, the prosecutor.

Ward gave notice of appeal, and entered into recognisances, himself in 30*l.*, and two sureties each in 15*l.*, conditioned for the appearance of Ward at the next General Quarter Sessions for Warwickshire, and then and there trying the appeal, abiding the judgment of the Court, and paying such costs as by the said Court should be awarded.

The next Quarter Sessions for Warwickshire were holden at Warwick on 31st December, 1855; but, before that day, Ward gave notice to Powers of abandonment of the appeal. At the Sessions, the Court, at the instance of Powers, made an order, reciting the above facts, and that Ward, being duly called on his recognisance, had not appeared, and ordering that he "do forthwith, upon notice of this order, pay or cause to be paid the penalty of 2*s.* 6*d.* and the sum of 2*l.* 7*s.* 6*d.* for the costs as awarded by the said conviction. And it is further ordered, adjudged, and awarded by this Court that the said James Ward do forthwith, upon notice of this order, pay or cause to be paid unto the said William Powers, the prosecutor and complainant, the sum of 17*l.* 0*s.* 8*d.* towards his costs in the said appeal, and incident thereto and occasioned thereby: which said sum of 17*l.* 0*s.* 8*d.* appears to this Court to be just and reasonable for such costs aforesaid."

*839] *Ward died on 25th January, 1856. The 2*s.* 6*d.* and the 2*l.* 7*s.* 6*d.* were paid: and payment of the 17*l.* 0*s.* 8*d.* was demanded of his sureties; but they refused to pay, and, before the next Quarter Sessions, gave notice of intention to make the present motion for a certiorari. At such next Sessions, which were holden in April, application was made, on behalf of Powers, to estreat the recognisances; but the Court adjourned the case, in order that the event of the present motion might be ascertained. In last Term,(*a*)

I. Spooner and *Bittleston* showed cause.—By sect. 26 of stat. 12 & 13 Vict. c. 92, the certiorari is taken away; the rule therefore must be discharged, unless it is shown that the Sessions had no jurisdiction. It is objected that the Sessions had no power to give the costs of the appeal, because the appeal was a mere nullity, the statute giving no appeal. That turns upon the language of sect. 25, which gives the appeal "in all cases where the sum adjudged to be paid on any conviction shall exceed 2*l.*, and in all cases where imprisonment shall be adjudged." It is true that, as the imprisonment is here ordered only in default of the payment of the sum adjudged, this cannot be con-

(*a*) June 9th. Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, Js.

sidered as coming within the words "where imprisonment shall be adjudged." But, as the penalty adjudged was 2*s.* 6*d.* and the costs 2*l.* 7*s.* 6*d.*, "the sum adjudged to be paid" is, on the whole, 2*l.* 10*s.*, which exceeds the 2*l.* That is what the conviction adjudges; and the imprisonment is adjudged unless the whole is paid. This view is strengthened by a comparison of sect. 14 with sect. 18. *Sect. 14 enacts that the party "convicted shall pay such penalty, [*840 damage, or compensation as the said justice shall according to the provisions of this Act adjudge, order, or award, together with the costs of conviction, to be settled by such justice, or be otherwise dealt with according to the provisions of this Act:" Sect. 18 enacts "that, in every case of a conviction under this Act, where the sum imposed as a penalty, or the amount awarded for compensation or damage, *together with costs* (if any), by any justice of the peace, for or in respect of any offence against the provisions of this Act, shall not be paid immediately upon the conviction, or within such time as the convicting justice shall, in the exercise of his discretion, appoint and limit in that behalf," the justice is to commit the offender for any term not exceeding two calendar months, "unless payment be sooner made," that is, clearly, payment of the penalty together with the costs. It is also objected that the order should have directed the payment to be made to the clerk of the peace. (The Court having pronounced no judgment on this point, the argument is omitted.)

A. R. Adams and *J. W. Huddleston*, contrà.—There can be no appeal where the Legislature does not give it in direct terms; Regina *v.* Stock, 8 A. & E. 405 (E. C. L. R. vol. 35). The word "adjudged," in sect. 25, is a term of art, the proper term for assigning the penalty, but not for expressing the amount of costs awarded. The proper term for costs is "award," as in stat. 18 G. 3, c. 19, s. 5. [*Bittleston* referred to the Malicious Injuries Act, 7 & 8 G. 4, c. 30, s. 24.] The intended test as to the propriety of *appeal is the gravity of the [*841 offence, which is measured by the penalty inflicted: the amount of costs in no way indicates it, but depends upon the number of witnesses, their residence, &c. By sect. 14 the justice does not adjudge the costs, but they are "to be settled" by him. In sect. 18 the penalty is called a "sum;" the compensation or damage with the costs, "the amount awarded;" and the appeal clause, sect. 25, speaks of the "sum" adjudged to be paid. *Cur. adv. vult.*

CROMPTON, J., now delivered the judgment of the Court.

We think that the party in this case had no right of appeal. The appeal is the creature of the statute, and can only exist where it can clearly be collected from the language of the statute that it was the intention of the Legislature to give the appeal.

We think the sum adjudged to be paid on conviction refers to the sum in which the party is convicted, and does not include the costs.

By the 14th section the party is to "pay such penalty, damage, or compensation," as the justice shall "adjudge, order, or award, together with the costs of conviction" (not given by the justice, but by the statute), and which the justice is to settle. The justice has no power of ordering, adjudging, or awarding that the party shall have costs, but is merely to settle what the costs shall be. His province as to the costs is that of the taxing officer, not of the judge. The sum adjudged to be paid in the 25th section seems to us more properly to relate to the sum which the party is to pay by way of penalty or compensation, than to the costs: and we think that the meaning of the Act is that, *842] where the subject-matter is of a slight nature, so that *the penalty or compensation is under the 2*l.*, the matter is to rest where it is, and is not to be removed into another Court.

The provision for an appeal, in every case where there is imprisonment, is in favour of this view. We think that the right to appeal is to depend on the comparative gravity of the offence, and not on the amount of the costs, which do not depend on the nature of the offence, but vary according to the distance of the residence of the parties, the number of witnesses, the number of adjournments, and other similar matters.

It is sufficient for the decision of this case to say that it does not appear to us that an appeal is given by express words, and that we cannot see any sufficiently expressed intention of the Legislature that there should be an appeal in a case like the present. And we therefore think that this rule should be absolute. Rule absolute.

MENNIE *v.* BLAKE. *July* 3.

F., being in possession of plaintiff's goods, not as his servant, but as bailee with a special property, delivered them to defendant with intent to give him a lien against plaintiff; and defendant peaceably and bonâ fide took possession with this intention, but had no lien and had no right to detain the goods as against plaintiff. Plaintiff demanded the goods, and, being refused, brought replevin. Plea: Non cepit. On proof of the above facts plaintiff had a verdict, with leave to defendant to move to enter a verdict. A rule being obtained,

Held: that there had been no taking changing the possession; and that, though the plaintiff could have recovered in trover or detinue, replevin did not lie. And a rule was made absolute for a nonsuit.

REPLEVIN. Plea: Non cepit. Issue thereon.

The cause came on to be tried before Crowder, J., at the last Spring Assizes for Devon. The following account of the facts which then appeared in evidence is taken from the judgment of this Court.

"One Facey was indebted to the plaintiff. He brought him *843] 15*l.* towards payment of the debt, but requested and obtained permission to lay the money out in the purchase of a horse and cart, which were to be the property of the plaintiff, but of which Facey was

to have the possession and the use, subject to such occasional use as plaintiff might require to have of them, and to their being given up to plaintiff when he should demand them. Accordingly Facey made the purchase: the possession and the use were substantially with him; he fed, stabled, and took care of the horse; there was some evidence that his name was on the front of the cart; certainly plaintiff's was on the side; under what circumstance placed there the evidence was contradictory, the plaintiff alleging it to have been placed in the ordinary way as an evidence of property, the defendant insinuating that it was so placed in order to protect it from Facey's other creditors. It is not however material, because on the one hand the plaintiff's property we take to be indisputable, and on the other we do not think there is evidence enough to charge the defendant with fraud or collusion in the circumstances under which he obtained possession, and which we now proceed to state.

"Facey determined to emigrate; and the defendant knew of his intention; but the plaintiff did not. The horse and cart were used in transporting Facey's effects to the pier at which he was to embark; and the defendant, to whom he owed money for fodder supplied to the horse, went with him to procure payment if he could: at parting, Facey delivered the horse and cart to him, telling him to take them for the debt, but *adding that he owed the plaintiff money also, and that, if he would discharge the debt due to the defendant, which was much less than their value, he was to give them up to him. In this manner the defendant acquired his possession. The plaintiff for some time remained in ignorance of what had passed; and afterwards, coming to the knowledge of it, demanded them; but the defendant refused to deliver them unless his debt were paid: whereupon the plaintiff proceeded to replevy the goods, and so brought the present action." [*844

Upon these facts the learned Judge directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendant or a nonsuit, if under such circumstances replevin did not lie.

Montague Smith, in the ensuing Term, obtained a rule Nisi accordingly.

Collier and *Karslake*, in last Hilary Term, showed cause.(*a*)—It is not disputed that trover or detinue would have lain; but it is said replevin will not. Replevin is not confined to cases of goods taken by way of distress; Mellor *v.* Leather, 1 E. & B. 619 (E. C. L. R. vol. 72), George *v.* Chambers, 11 M. & W. 149.† If the plaintiff had delivered the goods upon a contract, replevin would not lie; Galloway *v.* Bird, 4 Bing. 299 (E. C. L. R. vol. 13); but on the evidence Facey gave them without authority, and the detainer by the defendant was tortious. Every unlawful detention is a taking; Evans *v.* Elliott, 5 A. & E. 142 (E. C. L. R. vol. 31), Six Carpenters' Case, 8 Rep. 146 a.

(*a*) May 22d and May 24th. Before Coleridge, Erle, and Crompton, Js.

*845] **Montague Smith* and *Coleridge*, contrà.—It may be that replevin is not confined to takings by way of distress, but will lie wherever there is a wrongful taking of goods. That is all that is said in George *v.* Chambers, 11 M. & W. 149,† and Mellor *v.* Leather. And, where there there has been originally a taking, every wrongful detention is a fresh taking. But replevin does not lie on the ground of a wrongful detention, when there has been no taking originally; Galloway *v.* Bird; nor if the original taking were abroad, though the goods are detained here; Nightingale *v.* Adams, 1 Shower, 91. The analogy is close to the asportavit in felony. The question then comes, what is the taking requisite to support replevin. In Ex parte Chamberlain, 1 Sch. & Lef. 320, and Shannon *v.* Shannon, 1 Sch. & Lef. 324, Lord Redesdale points out that it would be most unjust to enable the claimant to change the possession of goods. Replevin can only be to restore the possession as it was before the taking; and that taking must therefore be a real change of possession in invitum. The course of pleading shows this. The avowant must make a good title in omnibus; note (3) to Poole *v.* Longuevill, 2 Wms. Saund. 285. The reason is that the plaintiff in replevin is in possession, and the avowant is therefore to show a title against him. The taking, therefore, must have been a real one, disturbing that kind of possession in the plaintiff that would be primâ facie title as against the avowant. If replevin could be brought against a person who peacefully and lawfully obtained possession, it would enable a claimant, who, if he brought trover, would have

*846] to prove his title *affirmatively, to throw upon the other side the burthen of pleading a title as against him.

Cur. adv. vult.

COLERIDGE, J., now delivered judgment.—This was a rule to enter a nonsuit or verdict for the plaintiff on a plea of Non cepit to a declaration in replevin. And the facts were in substance these. His Lordship then stated the facts as ante, p. 843, and proceeded as follows.

Upon these facts the question raised is, Whether there was any taking of the horse and cart from the plaintiff by the defendant? And we are of opinion, looking to the nature and purpose of the action of replevin, that there was no taking in the sense in which that word must be understood in this issue. The whole proceeding of replevin, at common law, is distinguished from that in trespass in this, among other things: that, while the latter is intended to procure a compensation in damages for goods wrongfully taken out of the actual or constructive possession of the plaintiff, the object of the former is to procure the restitution of the goods themselves; and this it effects by a preliminary ex parte interference by the officer of the law with the possession. This being done, the action of replevin, apart from the replevin itself, is again distinguished from trespass by this, that, at the time of declaring, the supposed wrongful possession has been put an end to, and the litigation

proceeds for the purpose of deciding whether he, who by the supposition was originally possessed, and out of whose possession the goods were taken, and to whom they have been restored, ought to retain that possession, or whether it ought to be restored to the defendant. Blackstone (3 Comm. 146), after observing that the Mirror ascribes *the invention of this proceeding to Glanvil, says that it "obtains only in one instance of an unlawful taking, that of a wrongful distress." If by this expression he only meant that in practice it was not usual to have recourse to replevin except in the case of a distress alleged to be wrongful, he was probably justified by the fact. But there are not wanting authorities to show that the remedy by replevin was not so confined; and in the case of Shannon *v.* Shannon, 1 Sch. & Lef. 324, 327, Lord Redesdale finds fault with this passage, saying that the definition is "too narrow," and that "many old authorities will be found in the books of replevin being brought where there was no distress:" and the learned reporters, in a note to the passage, refer to Spelman's Glossary, 485 (tit. *Replegio*); Doctrina Placitandi, *Replevin*, 313; Com. Dig. *Replevin* (A); and Gilbert, Distress and Replevin, 58 (4th ed. p. 80). [*847

There is no doubt that passages, such as those referred to, may be found, stating the definition very broadly; yet we believe that, when the authorities on which some of them rest are examined, and when due attention has been paid to the context in others, it will appear in the result questionable, at the least, whether the commentator's more qualified definition was not correct; at least that replevin was instituted as a peculiar remedy, and under the Statute of Marlbridge, by plaint as a festinum remedium for the injury of an unlawful distress.

Thus in 2 Roll. Abr. 430, *Replevin* (B) 2, it is said, if trespasser takes beasts, replevin lies of this taking at election; the authority for this is Yearb. Mich. 7 H. 4, fol. 28 B: where, the counsel, or another Judge, alleging the contrary, Gascoigne(*a*) says, "He may elect to *have replevin or writ of trespass;" but he adds, or the reporter adds, "and some understand that he cannot;" for which last a reason is given. [*848

Again, Com. Dig. *Replevin* (A): "Replevin lies of all goods and chattels unlawfully taken:" for this no authority is cited; but the context shows that the Chief Baron was thinking, not so much of the circumstances under which taken, as of the things themselves; for he adds, "whether they be live cattle, or dead chattels," or "a swarm of bees," or "iron of his mill," citing Fitzherbert's Natura Brevium, in whose chapter on Replevin we do not find the law so broadly laid down. As to the passage to which reference is made in Lord Chief Baron Gilbert, it should be remembered that the treatise is on the Law of Distresses and Replevins, and the passage occurs in a chapter in which replevin is treated of with reference to distress, as if the two formed parts of one subject-matter. Little therefore can be inferred from the

(*a*) C. J. of K. B.

generality of the language in a single sentence. A dictum of Lord Ellenborough has also been referred to in Dore *v.* Wilkinson, 2 Stark. N. P. C. 287 (E. C. L. R. vol. 3), from which the inference is that he thought replevin might conveniently be had recourse to more often than it was, instead of bringing trover; but it was an observation thrown out in the course of a cause, a recollection of what Mr. Wallace used to say, not ruling any point, nor deciding anything, in the cause: much importance ought not to be attached to such casual observations, even of so great a Judge, at Nisi Prius. On the other hand, Lord Coke seems to be authority the other way. In Co. Litt. 145 b, is the following passage: "A replegiare lyeth, *as Littleton here teacheth us, *where goods are distrained and impounded*, the owner of the goods may have a writ de replegiari facias, whereby the sheriff is commanded, taking sureties in that behalf, to redeliver the goods distrained to the owner, or upon complaint made to the sheriff he ought to make a replevy in the county. Replegiare is compounded of re and plegiare, as much as to say, as to redeliver upon pledges or sureties."

*849]

From a review of these and other authorities which might be added, it may appear not settled whether originally a replevy lay in case of other takings than by distress. Nor is it necessary to decide that question now; for, at all events, it seems clear that replevin is not maintainable unless in a case in which there has been first a taking out of the possession of the owner. This stands upon authority and the reason of the thing. We have referred already to a dictum of Lord Redesdale. Three cases are to be found; Ex parte Chamberlain, 1 Sch. & Lef. 320, In re Wilsons, 1 Sch. & Lef. 320, note (*a*), and Shannon *v.* Shannon, 1 Sch. & Lef. 324, in which the law is so laid down by Lord Redesdale. And these are cases of great authority; for that very learned Judge found the practice in Ireland the other way. He felt the inconvenience and injustice of it: he consulted with the Lord Chief Justice and obtained the opinion of the other Judges, and then pronounced the true rule, which, in one of these cases, In re Wilsons, he thus states: The writ of replevin "is merely meant to apply to this case, (viz.) where A. takes goods wrongfully from B., and B. applies to have them redelivered to him upon giving security until it shall appear whether A. has taken them rightfully. But if A. be in possession of goods, in which *B. claims a property, this is not the writ to try that right." In the course of these cases his Lordship points out how replevin proceeds against the general presumption of law in favour of possession; how it casts upon him who was in possession the burthen of first proving his right; and he puts (Ex parte Chamberlain, 1 Sch. & Lef. 322), as a reductio ad absurdum, a case not unlike the present. "Suppose," says he, "the case of a person having a lien on goods in his possession, and who insists on being paid before he delivers them up: I do not see *on the principles insisted on*, why a writ

*850]

of replevin may not issue in that case." The reason of the thing is equally decisive: as a general rule it is just that a party in the peaceable possession of land or goods should remain undisturbed, either by the party claiming adversely or by the officers of the law until the right be determined and the possession shown to be unlawful. But, where, either by distress or merely by a strong hand, the peaceable possession has been disturbed, an exceptional case arises; and it may be just that, even before any determination of the right, the law should interpose to replace the parties in the condition in which they were before the act done, security being taken that the right shall be tried, and the goods be forthcoming to abide the decision. Whatever may be thought of Lord Coke's etymology, what he says of replegiare, while it shows his understanding of the law, gives a true account of what replevin is, a redelivery to the former possessor on pledges found. But this is applicable clearly to exceptional cases only. If, wherever a party asserts a right to goods in the peaceable possession of another, he has an election to take them from him by a replevin, it is obvious that the most crying *injustice might not unfrequently result. Now, in the present [*851 case, Facey was not the servant of the plaintiff; nor was his possession merely the possession of the plaintiff; he was the bailee of the plaintiff, and had a lawful possession from the delivery of the owner, which conferred on him a special property. This did not authorize him to transfer his possession to the defendant; nor could he give him a lien for his debt against the paramount right of the true owner the bailor: after a demand and refusal, upon the admitted facts in this case, the plaintiff could clearly have maintained trover against the defendant; but yet there was nothing wrongful in his accepting the possession from Facey; he acquired that possession neither by fraud nor violence; at least none is found, and we cannot presume either; and he retained the possession on a ground which might justify the retainer until the alleged ownership was proved. This therefore, in our opinion, was a case in which the plaintiff could not proceed by replevin, but should have proved his prior right in trover or detinue.

It appeared in this case that the sheriff's deputy for the issuing of replevins was the attorney for the plaintiff: and, although we have no reason to believe that anything wrong was *here* intended, we think it right to notice this circumstance, because it is one which obviously might lead to much abuse and oppression. It is proper to be known that there are several cases to be found in the books in which attachments have issued, where replevins have been thought to have been granted improperly and from improper motives.

The rule should be absolute, not to enter a verdict, but a nonsuit.

Rule absolute for a nonsuit.

That replevin lies only on a tortious taking, see Pangburn *v.* Patridge, 7 Johnson, 140; Hopkins *v.* Hopkins, 10 Ibid. 373; Boulton *v.* Thompson, 14 Ibid. 87;

Gardner *v.* Campbell, 15 Ibid. 402; Marshall *v.* Davis, 1 Wendell, 109; Bruce *v.* Ogden, 6 Halst. 370; Corsson *v.* Stout, 17 Johnson, 116; Trapnall *v.* Hattin, 1 English, 18; Drummond *v.* Hopper, 4 Harrington, 327.

But contra, Weaver *v.* Lawrence, 1 Dallas, 157; Shearick *v.* Huber, 6 Binn. 3; Stoughton *v.* Rappalo, 3 Serg. & Rawle, 562; Harlan *v.* Harlan, 15 Penna. State Rep. 507.

*852] *The Proprietors of The REGENT'S CANAL, Appellants, *v.* The Overseers of HENDON, Respondents. *July* 3.

By stat. 52 G. 3, c. cxcv. s. 1, The R. Canal Company was incorporated, and power was given to the corporation to hold lands without restriction as to amount or locality, and to take lands and to form a canal in certain enumerated parishes, amongst which H. was not. By sect. 101 lands "of and belonging to the said Company" were to be rated like other lands of a like quality in the same parishes. Subsequently lands were purchased in the parish of H. in the name of a trustee, and occupied by the R. Canal Company as a reservoir.

Held: that sect. 101 of stat. 52 G. 3, c. cxcv., was prospective, and applied to all lands acquired by the R. Canal Company; and that the lands in H., the fee of which was in another party, but which were substantially occupied by the R. Canal Company, were to be rated as other lands of a like quality in the parish of H.

NOTICE of appeal to the Middlesex Sessions being given by The Company of Proprietors of the Regent's Canal against a rate for the relief of the poor of the parish of Hendon, made on the 22d day of May, A. D. 1855, a case was stated for the opinion of this Court, the material parts of which were as follows.

So much of the rate as is relevant to this case is in the following form.

Occupier.	Owner.	Description of Property rated.	Name or situation of Property.	Estimated extent.	Gross estimated rental.	Rateable value.	Rate at 9d. in the pound.
Regent's Canal, Company of proprietors.	Selves.	Land used as a reservoir tithe rent-charge, and fishery.	Harp Reservoir.	a 130	£910	£364	£36
Do.	Do.	Cottages.	Near do.		15	12	

*853] The parties do not desire the opinion of the Court in respect of the rateability of the fishery, tithe *rent-charge, or the cottages, as the present controversy relates only to the principle on which the 130 acres are to be assessed, and to the question whether the appellants are to be assessed in respect of the whole, or any, and what part thereof.

In the year 1819 The Grand Junction Canal Company, The Grand Junction Waterworks Company, and The Regent's Canal Company entered into an agreement under seal, dated the 26th of May, 1819, for, among other things, transferring and vesting in The Grand Junction Waterworks Company certain powers, then vested in The Regent's Canal Company, for taking and having a supply of water from the Thames, and for supplying to The Regent's Canal Company, for the purposes of the navigation of the Regent's Canal, the water which The Grand Junction Waterworks Company were then entitled to have supplied to them by The Grand Junction Canal Company. In order to carry the agreement into effect stat. 59 G. 3, c. cxi.,(*a*) was passed.

Before and at the time of the making of the agreement, the powers and duties of The Grand Junction Canal Company were regulated, independently of its relations to The Grand Junction Waterworks Company, by stat. 33 G. 3, c. 80,(*b*) and stat. 34 G. 3, *c. 24; (*c*) [*854 by force of which the Grand Junction Canal is brought from Braunston, in Northamptonshire, to Brentford, in Middlesex, and stat. 35 G. 3, c. 43,(*d*) by which the Grand Junction Canal is carried on from Norwood, in Middlesex, to Paddington, by means of the artificial channel popularly called the Paddington Canal. The relations of The Grand Junction Canal Company to The Grand Junction Waterworks Company were regulated, before and at the time of the said agreement, by stat. 38 G. 3, c. 33,(*e*) and stat. 51 G. 3, c. clxix.(*g*) In fact, The Grand Junction Canal Company obtained statutory powers of supplying Paddington and Marylebone with water from their canal only; they then leased their powers and a right to call on them for a supply of water in exercise of those powers, not exceeding 57,700 tons per week, to one Hill, who got up The Grand Junction Waterworks Company, which, before and at the time of the said agreement of 1819, was entitled to

(*a*) Local and personal, public. "To vary and alter certain Acts of His present Majesty, relating to The Grand Junction Canal, The Grand Junction Waterworks, and the Regent's Canal, in order to effect an exchange of water, for the better supply of the Regent's Canal Navigation and Grand Junction Waterworks."

(*b*) "For making and maintaining a navigable canal from the Oxford Canal Navigation at Braunston, in the county of Northampton, to join the river Thames at or near Brentford, in the county of Middlesex, and also certain collateral cuts from the said intended canal."

(*c*) "For making certain navigable cuts from the towns of Buckingham, Aylesbury, and Wendover, in the county of Buckingham, to communicate with the Grand Junction Navigation, authorized to be made by an Act of the last Session of Parliament; and for amending the said Act."

(*d*) "For making a navigable cut from The Grand Junction Canal, in the precinct of Norwood, in the county of Middlesex, to Paddington, in the said county."

(*e*) Local and personal, public. "For confirming and carrying into execution certain articles of agreement made and entered into between Beilby Lord Bishop of London, Thomas Wood, Esq., Sir John Frederick, baronet, and Arthur Stanhope, Esq., Sir John Morshead, baronet, and dame Elizabeth his wife, and Robert Thistlethwayte, Esq., and Selina his wife, and the Company of proprietors of the Grand Junction Canal; and for other purposes therein mentioned."

(*g*) Local and personal, public. "For confirming certain articles of agreement entered into between the Company of proprietors of the Grand Junction Canal and certain persons, for supplying with water the inhabitants of the parish of Paddington, and the parishes and streets adjacent, in the county of Middlesex."

*855] have and *did have their water supplied from the Grand Junction Canal. The Regent's Canal begins where the Paddington Canal ends. By the Act constituting The Regent's Canal Company (52 G. 3, c. cxcv.(*a*)) The Regent's Canal Company were empowered to supply their canal with water from the Thames at Chelsea. Stat. 34 G. 3, c. 24, s. 19, enacts "that the said Company of proprietors shall from time to time be rated to all parliamentary and parochial taxes and assessments, for and in respect of the lands and grounds already purchased or taken, or to be purchased or taken, and all warehouses or other buildings to be erected by the said Company of proprietors, in pursuance of the said recited Act and this Act, in the same proportion as other lands, grounds, and buildings, lying near the same are or shall be rated, and as the same lands, grounds, and buildings, so purchased or taken, or to be purchased or taken, and erected, would be rateable in case the same were the property of individuals in their natural capacity." Stat. 52 G. 3, c. cxcv., is the first of the Acts of The Regent's Canal Company. Sect. 1 enables the Company to make a canal to be called The Regent's Canal, into and through several parishes, of which Hendon (the respondent parish) is not one, and also mentions the parishes, &c. (Hendon not being one), at, in, to, or through which reservoirs may be made, erected, or maintained. Sect. 101 enacts "That the lands, whether covered with water or not, and also all dwelling-

*856] houses, *wharfs, warehouses, lockhouses, and other houses of and belonging to the said Company shall be rateable and chargeable to the maintenance of the poor, and to all other parochial rates and taxes, in the several parishes and places where they are respectively situated, the lands according to their quantity and quality, and the dwelling-houses, wharfs, warehouses, lockhouses, and other houses, according to the nature and respective uses, dimensions, and descriptions thereof, and shall be charged and assessed in like manner as lands of a like quality, and dwelling-houses, wharfs, warehouses, lockhouses, and other houses of a like and similar size, nature, dimension, or description, in the respective parishes where the same shall be situate, are or shall be assessed or charged; and that the rates, duties, and other personal property of the said Company liable to be rated to the poor or other parochial taxes in any such parishes or places, shall be rated and assessed in like manner and in the same proportion as other personal property rateable in the said parishes and places respectively shall be rated and assessed, and according to the length of the line of the said navigation in such respective parishes and places, and not otherwise, or in any other manner; provided that before such personal property shall be rated, fourteen days' notice shall be given in writing

(*a*) Local and personal, public. "For making and maintaining a navigable canal from The Grand Junction Canal in the parish of Paddington, to the river Thames in the parish of Limehouse, with a collateral cut in the parish of St. Leonard Shoreditch, in the county of Middlesex."

to or left at the dwelling-house or usual place of abode of the treasurer or clerk, or any other officer of the said Company, residing in the parish or place where such rate shall be intended to be made, by the respective overseers of the poor, of the intention so to do." It was not stated in the case, but was pointed out during the argument, that, though the powers to make the canal, *&c., were limited to certain enumerated parishes, in which Hendon was not included, [*857 sect. 1 also gave the Company "full power and authority to purchase and hold lands, tenements, and hereditaments, to them, their successors and assigns, for the use of the said navigation and undertaking," without any restriction as to locality.

The case then set forth the provisions of stat. 59 G. 3, c. cxi., and the effect of a deed of covenant and agreement, dated 26th May, 1819, made between The Grand Junction Canal Company, The Grand Junction Waterworks Company, and The Regent's Canal Company. These were principally material as affording evidence from which the Court might draw an inference of fact as to whether the appellants exclusively occupied the land forming the reservoir, or merely had an easement to store water there. The Court drew the inference from the whole case that they were occupiers of the whole land forming the reservoir. Such parts of the case as merely bore upon this question are omitted or abridged. The effect of the Act was to enable The Grand Junction Canal Company to exercise all their statutable powers for the purpose of supplying water to the Regent's Canal from the Paddington branch of the Grand Junction Canal, so soon as The Regent's Canal Company should have agreed with The Grand Junction Waterworks Company to accept this supply in lieu of The Regent's Canal Company's powers to take water from the Thames, and The Grand Junction Waterworks Company in consideration thereof to abandon their right to a supply of water from the Grand Junction Canal. The effect of the deed, so far as material to the present report, was to agree to this exchange, with provisions securing priority to the Grand Junction Canal when the water was low and not sufficient *to supply both canals. This [*858 arrangement was confirmed by stat. 7 G. 4, c. cxl.(*a*)

Under these Acts and deed of covenant or agreement the Regent's Canal was supplied from the Grand Junction Canal for a period of fifteen years, without any extension of the means or apparatus of supply. Towards the end of that period, however, The Regent's Canal Company thought it expedient to pen back the waters of the Brent into the

(*a*) Local and personal, public. "To amend an Act of His late Majesty's reign, for confirming certain articles of agreement between the Company of proprietors of the Grand Junction Canal and certain persons for supplying with water the inhabitants of Paddington and places adjacent in the county of Middlesex; and also an Act of His said late Majesty's reign, to alter certain Acts relating to the Grand Junction Canal, the Grand Junction Waterworks, and the Regent's Canal, in order to effect an exchange of water for the better supply of the Regent's Canal Navigation and Grand Junction Waterworks; and for amending the powers vested in The Grand Junction Waterworks Company; and for other purposes relating thereto."

natural basin formed by the converging slopes of the lands, of which the 130 acres mentioned in the rate are a part. By their own Act (52 G. 3, c. cxcv.) they had no power to take or hold any part of those lands. Under stat. 33 G. 3, c. 80, stat. 35 G. 3, c. 43, and stat. 59 G. 3, c. cxi., The Grand Junction Canal Company had the power to make and maintain a reservoir on the said lands for the purpose of supplying the Regent's Canal Navigation with water therefrom. In the year 1835, therefore, The Regent's Canal Company entered into negotiations, which terminated (so far as regards a portion of the 130 acres mentioned in the rate) in the land being conveyed by instruments in the following form, as in the said instrument mentioned (the name of The Grand Junction Canal Company being used, but the last-named Com-
*859] pany only *giving their names and lending their powers, and not interfering in any other way in the transaction).

I A. B. of , in consideration of the sum of £ to me paid by the Company of Proprietors of the Grand Junction Canal on behalf of the Company of Proprietors of the Regent's Canal, do hereby grant and release unto the said first-mentioned Company all that, &c. To hold to the said first-mentioned Company for ever, by virtue and according to the true intent and meaning of the Acts of Parliament passed for making and maintaining the Grand Junction Canal and the several cuts therefrom, and in particular of the Act of Parliament passed in the 59th G. 3, c. cxi. In witness, &c.

This conveyance was followed by an instrument under seal, dated the 16th of December, 1835. This agreement was part of the case; it was, however, only material as affording evidence as to the occupation of the land forming the reservoir; and, the Court having drawn the inference of fact that it was occupied by The Regent's Canal Company, it is omitted in this report. In the year 1835, and under the powers given to The Grand Junction Canal Company, by stat. 35 G. 3, c. 43, a dam was erected by the appellants to pen back the water of the Brent into the land conveyed as above mentioned; and so the reservoir was originally made. The capacity of the reservoir formed by the land conveyed in 1835 proving insufficient for the purposes of The Regent's Canal Company, an additional part of the said 130 acres was conveyed, in the year 1838, in a manner and under circumstances precisely similar to the conveyance of the year 1835. In the same year the dam was enlarged and strengthened by the appellants so as to be capable of withstanding the pressure of the increased accumulation
*860] *of water. The area of lands affected by these conveyances thus made in the years 1835 and 1838 is, in the whole, 75 acres. The dam and apparatus connected therewith were always under the control and management of The Regent's Canal Company. The case then stated facts for the purpose of showing that The Grand Junction Canal Company occupied the reservoir, subject to an easement in The

Regent's Canal Company; but the Court drew a contrary inference. These facts are omitted. In fact, the money paid upon the conveyances above mentioned was paid to the vendors by The Regent's Canal Company, out of their own funds, without the interference of The Grand Junction Canal Company. The reservoir could not be enlarged beyond the said 75 acres without taking in other lands, which neither The Grand Junction Canal Company nor The Regent's Canal Company had power to take or hold. Some time after the 75 acres had been formed, as above, into a reservoir, which is called the Brent reservoir, the appellants, with the consent of The Grand Junction Canal Company, supplied, for profit, from their canal The London and North Western Railway Company with water for the use of their locomotive engines, and also allowed the water of the appellants' canal to be used for the purpose of manufactories on the canal. This proceeding remained without sanction by the Legislature until the year 1851. In that year, the 75 acres having for some time been found to be of capacity inadequate to the business of the appellants, stat. 14 & 15 Vict. c. xxxii.(*a*) was passed, which, after reciting the existence of the *Brent reservoir, and that the supply of water, obtainable from [*861
the sources from which the appellants were then authorized to draw water for the service of their canal, was insufficient for the increased and increasing trade of their canal, empowered the appellants to enlarge the said reservoir, and to collect into it, as intended to be enlarged, the water of the river Brent, and to convey such water into the Grand Junction Canal by means of the feeder which then communicated between the then existing reservoir and the Grand Junction Canal, in the parish of Willesden. Under the powers of the last-mentioned Act the residue of the said 130 acres were purchased in fee by the appellants. The last-mentioned Act contains no provisions whatever with respect to rating. After the said purchase the dam was again enlarged and strengthened by the appellants, and thereby the present reservoir made. This reservoir so enlarged extends into the three parishes of Willesden, Kingsbury, and Hendon; but by far the greater part of it is in the parish of Hendon. The whole reservoir and its waters are under the control and management of the appellants, who let the fishing. The dam is not so constructed as to deliver from the Brent into the feeder, in a given period of time, a larger volume of water than would have been delivered, in an equal period of time, before any part of the 130 acres had been purchased: but by means of the reservoir the period of supply is lengthened, and so the appellants obtain the quantity which they require in excess of what they required and received before the purchase in 1835. The 8th section of stat. 14 & 15 Vict. c. xxxii. is in the following words: "That nothing in this

(*a*) Local and personal, public. "To enable the Company of proprietors of the Regent's Canal to enlarge the reservoir on the river Brent; and to amend the Acts relating to the canal."

Act contained shall extend or be construed to extend to take away, abridge, alter, or affect *the rights or interests of the Company *862] of proprietors of the Grand Junction Canal to or in any of the waters of the river Brent to be collected in the said reservoir, whether in its existing state or as the same shall have been enlarged under this Act, but that the said Company of proprietors of the Grand Junction Canal shall have such and the same use, right, and benefit of, in, and to all the said waters as they would have had if this Act had not passed." Sect. 9 is as follows: "And whereas the said Company of proprietors of the Regent's Canal have, with the consent of the said Company of proprietors of the Grand Junction Canal, supplied The London and North Western Railway Company with some of their surplus water for the use of their locomotive engines, and have otherwise allowed the water of the said canal to be used for purposes of manufactories on the canal, and doubts may arise whether, under the provisions of the said secondly recited Act of the 59th year of the reign of King G. 3, and of the said Act of the 7th year of the reign of King G. 4, such application of water was legal: Be it therefore enacted, that, notwithstanding any thing in the two last-mentioned Acts or either of them or in this Act contained, it shall be lawful for the said Company of proprietors of the Regent's Canal, with the consent of the Company of proprietors of the Grand Junction Canal under their common seal, to dispose of or permit to be taken from their canal and works any water to or by any person or persons, provided the same be applied for the use of any locomotive or other steam engines, or for any manufactories upon the canal or connected therewith." The appellants have, continually since the passing of the last-mentioned Act to the time of making the rate appealed against, supplied *water *863] for the use of locomotive and other steam engines, and for manufactories on the canal or connected therewith, under the powers conferred on them by the said 9th section, for which supply they have been paid by the parties supplied. The river Brent, by means of the said reservoir in the respondent parish, near the said feeder, is one of the sources from which the supplies of the water have been obtained for the purposes of being used by the appellants as last mentioned. All the Acts of Parliament relating to The Grand Junction Canal Company, The Grand Junction Waterworks Company, and The Regent's Canal Company, with the exception of one, were passed and came into operation before the passing and coming into operation of the Parochial Assessment Act, 6 & 7 W. 4, c. 96. The only clauses, in the whole series of the said Acts, which expressly relate to rating are the 19th section of stat. 34 G. 3, c. 24, and the 101st section of stat. 52 G. 3, c. cxcv.

The case then referred to a map on which the different portions of the 130 acres acquired at different times were shown. The various

Acts, and the two agreements of 1819 and 1835, above referred to, accompanied the case, and were to be parts of it. The case then concluded as follows.

It is agreed by the parties that such portion of the 130 acres as ought not to be assessed according to either of the rating clauses above mentioned ought to be assessed at 7*l.* per acre, and that such portion thereof as ought to be assessed according to either of the said rating clauses ought to be assessed at 8*l.* per acre. The question for the opinion of the Court is, Whether the appellants are liable to be rated for the whole or some, and, if some only, what part, *of the said 130 acres, and what amount in respect thereof. [*864

The case was argued in last Trinity Term.(*a*)

Pashley, in support of the rule.—This reservoir is formed upon land acquired at three different times. The two parcels of the land first acquired, forming in all seventy-five acres, were purchased in the name of The Grand Junction Canal Company, who are the legal owners of the fee of this part of the reservoir. As far as regards that portion of the land there is a question of fact, whether the Regent's Canal Company are occupiers of that land or not. (His arguments on the question of fact are omitted. It will be seen from the judgment that the Court drew the inference that this land was conveyed to The Grand Junction Canal Company substantially for the Regent's Canal Company, who occupied the whole reservoir, though The Grand Junction Canal Company had, by virtue of the provisions for securing them a priority of supply in times of drought, some control over their mode of occupation.) The rest of the reservoir is admittedly occupied by The Regent's Canal Company. Then the question arises whether the rating clauses, either in the Grand Junction Canal Act (34 G. 3, c. 24, s. 19), or in the Regent's Canal Act (52 G. 3, c. cxcv., s. 101), apply to any part of this land. As far as regards stat. 34 G. 3, c. 24, s. 19, it clearly is confined to cases in which The Grand Junction Canal Company are themselves rated as occupiers, and cannot apply to land occupied by others who are rated in respect thereof, even if the occupiers are tenants to The Grand Junction Canal Company. Stat. 52 G. 3, *c. cxcv., s. 101, applies only to lands acquired by The Regent's Canal Company under that Act, which authorizes the making of [*865 the canal and reservoirs in certain parishes only (excluding Hendon). The land in question was acquired ultra vires of that Act, and is partly used for purposes not authorized by it. This section therefore cannot apply to it.

T. F. Ellis, contrà.—The Regent's Canal Company have no more than an easement over the 75 acres which remain in the occupation of The Grand Junction Canal Company, subject to that easement. (His arguments as to this question of fact are omitted. On the general law

(*a*) Saturday, June 7th. Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, Js.

upon this point, he referred to Doe dem. The Queen *v.* Archbishop of York, 14 Q. B. 81 (E. C. L. R. vol. 68), Bruce *v.* Willis, 11 A. & E. 463 (E. C. L. R. vol. 39), Rex *v.* The Mersey and Irwell Navigation Company, 9 B. & C. 95 (E. C. L. R. vol. 17), Rex *v.* The Chelsea Waterworks Company, 5 B. & Ad. 156 (E. C. L. R. vol. 27), Electric Telegraph Company *v.* Overseers of Salford, 11 Exch. 181.† As to the amount of rate: stat. 52 G. 3, c. cxcv., s. 1, gives The Regent's Canal Company powers to make a canal, &c., and for that purpose compulsorily to take lands, within certain enumerated parishes only, of which Hendon is not one: but it authorizes the Company to hold lands anywhere, if they can acquire them in any legal mode. And sect. 101 is general in its terms, applying not only to the lands taken compulsorily but to all lands. It must in its nature be prospective, or there could never be anything for the section to operate on, as that Act created the Company, who must therefore acquire all their lands subsequently. Only three cases have been found in *which it has been considered whether rating clauses of this kind applied to after purchased lands: and it will be found that not one of them governs the present case. In Rex *v.* Dudley Canal Company, 7 Dow. & R. 466 (E. C. L. R. vol. 16), a rating clause was held not to be retrospective so as to apply to lands already occupied by the Company. That affords some authority for saying that such an enactment is primâ facie prospective. Rex *v.* Barnby Dun, 2 A. & E. 551 (E. C. L. R. vol. 29), which at first view seems to be in favour of the appellants, and Regina *v.* Badcock, 6 Q. B. 787 (E. C. L. R. vol. 51), which seems to be against them, were really decided on the special language of the particular Acts. There is nothing in the object of such a rating clause to make it invidious, or one to be construed strictly against the Company. It is a very reasonable enactment, as is pointed out by Abbott, J., in Rex *v.* The Grand Junction Canal Company, 1 B. & Ald. 289, 295.

*866]

Pashley was heard in reply. *Cur. adv. vult.*

COLERIDGE, J., now delivered judgment.

This was a case stated on an appeal against a rate made for the relief of the poor of the parish of Hendon; and the questions upon which our opinion was desired were: Whether the appellants were liable to be assessed, and, if so, on what principle in respect of the whole, or any and what part, of a reservoir of 130 acres in extent in the parish of Hendon. Two points arise for determination in this case: the first, Whether the appellants are in such occupation of all or any part of the 130 acres in question as to be rateable in respect thereof: the second, On what principle *they are to be assessed, if the first point be decided in the affirmative.

*867]

With regard to the first, it appears that the whole reservoir has been brought to its present area at three different times, in 1835, 1838, and 1853, by three different purchases; The Grand Junction Canal Com-

pany being the purchaser and the conveyances being made to that Company on the two first occasions, and the appellants being the purchasers and taking the conveyance only in the last. Upon the two first occasions, however, The Grand Junction Canal Company only lent their name as purchasers, because they had power, and The Regent's Canal Company had not, to make the purchase; the latter Company paid the price, and were the real parties to the transactions. We think, therefore, that this makes no difference between the two first and the last portions of the area on a question of rateable occupation. It appears moreover that, in consequence of arrangements between the two Companies, The Grand Junction Canal Company enjoys certain rights, and is empowered to exercise a certain control over the supply of water from the reservoir. But, upon a review of all the circumstances stated in the case, it appears to us clear that the substantial occupation of the whole is in the appellants.

The second question is answered, we think, by the 101st section of stat. 52 G. 3, c. cxcv., the Act under which The Regent's Canal Company was formed. By it "the lands, whether covered with water or not," "of, and belonging to the said Company shall be rateable and chargeable to the maintenance of the poor, and to all other parochial rates and taxes, in the several parishes and places in which they are respectively situated," *"according to their quantity and quality;" "and shall be charged and assessed in like manner as lands of a like quality" "in the respective parishes where the same shall be situate, are or shall be assessed or charged." *Such* a clause as this, framed with a view to regulate the assessment of parochial taxes, must be construed with reference, not to strict legal title, but to such occupation as makes the occupier rateable, and will apply to whatever lands are "of" the Company, or "belong" to it in that sense. And we think *this* clause is prospective: it would be to give it a very incomplete, almost no, effect, to limit it to such property, if any, as might belong to the Company at the time of the Act passing. [*868

We answer, therefore, the questions submitted to us, by saying that the appellants are liable to be rated for the whole of the 130 acres at 3*l.* per acre, the sum agreed between the parties.

Judgment accordingly.

The Honourable W. E. FITZMAURICE *v.* SIR JOHN BAYLEY, Baronet. *July* 3.

Defendant employed R., as his agent, to agree with plaintiff for the purchase of plaintiff's interest in a leasehold house. Plaintiff also held a stable under a demise distinct from that under which he held the house.

Defendant did not authorize R. to purchase the stable; and R. represented to defendant that he had purchased the lease of the house only; but in fact R. had taken from plaintiff an agreement in writing for the purchase of both. Afterwards, on plaintiff stating to defendant that such was the agreement, and requiring defendant to take the stable, defendant wrote and signed a letter to plaintiff, stating that defendant did not know what R. had agreed to, but must support him in all he had done for defendant. Held, that this was a ratification of R.'s agreement, whatever it might be, sufficient to constitute with it a signed memorandum, under sect. 4 of the Statute of Frauds (29 C. 2, c. 3), to charge defendant with a contract to take the stable. Per Lord Campbell, C. J., Wightman and Erle, Js. Crompton, J., not concurring.

THE declaration alleged that plaintiff, before and at the time of the
*869] making of the agreement after mentioned, was *lawfully possessed of a messuage and premises, with the appurtenances, commonly called Hamilton Lodge, situate at Kensington Gore, in the county of Middlesex, under a lease granted to plaintiff on or about 11th February, A. D. 1851, for a term of years, that is to say, from 25th December, A. D. 1850, for nine years and three quarters of another year, wanting ten days, subject to the payment of certain rent and the performance of certain covenants by plaintiff, his executors, administrators, and assigns, as in the lease mentioned; and plaintiff was also, before and at the time of the making of the said agreement, lawfully possessed of certain fixtures, furniture, and effects, being upon the said messuage and premises; and also of a certain leasehold stable, coach house and premises, with the appurtenances, situate at Kensington Gore aforesaid, which plaintiff then held for a certain other term of years therein, then to come and unexpired. And thereupon heretofore, to wit, 31st August, A. D. 1855, it was agreed, by and between plaintiff and defendant, in manner following, that is to say: that plaintiff should sell and assign to defendant the said messuage and premises, with the appurtenances, called Hamilton Lodge, and the said lease thereof, under and by virtue of which plaintiff held the same as aforesaid, and all his estate and interest therein, for all the then residue of the said term first above mentioned, at and for the price or premium of 100*l.*, subject to the payment by defendant of the rent, &c., and the performance by defendant of the covenants therein contained, defendant being liable to payment of the said rent and of all rates, &c., in respect of the said messuage and premises, with the appurtenances, from 29th September, A. D. 1855. And it was also then further agreed, by and between plaintiff
*870] and defendant, that plaintiff should sell and assign to *defendant the said fixtures, &c., at and for a price to be settled upon a valuation, &c.; and that plaintiff should also grant to defendant an underlease of the said stable, coach house, and premises, with the appurtenances, to

wit, for the term of five years, wanting fifteen days thereof, from 7th November, A. D. 1855, being a term less than the said term for which the same were so held by plaintiff as aforesaid, at the same rent and subject to the same conditions as the said stable, coach house, and premises, with the appurtenances, were then held by plaintiff. And thereupon, in consideration of the premises, and that the plaintiff, &c. (promise to perform the agreement on plaintiff's part), defendant promised to perform on defendant's part, and particularly that defendant would take and accept the said messuage, &c., called Hamilton Lodge, and the said lease thereof, and would also pay to plaintiff the 100*l*., and would also purchase and take the said fixtures, &c., and cause a proper valuation thereof to be made, and pay to plaintiff the price which should be so settled; and would also accept and take such underlease of the said stable, coach house, and premises as aforesaid, and execute the same when granted and tendered to him by plaintiff. Averment, that plaintiff has always been ready and willing to perform and fulfil the same: and, although he afterwards, and within a reasonable time in that behalf, to wit, on the day and year first aforesaid, offered to defendant to give up to him the said messuage and premises, with the appurtenances, and to convey to defendant the same, and the said lease or demise thereof, and all the estate, &c., of plaintiff therein, for all the residue of the said first-mentioned term, at the price, and in the manner, and upon the terms aforesaid, according to the said agreement, and also to sell to *defendant the said fixtures, &c., and to cause a proper valuation, &c., and, although plaintiff then also executed and tendered and offered to defendant, for his acceptance and execution, an underlease of the said stable, coach house, and premises, with the appurtenances, for the term in that behalf above mentioned, at the same rent and subject to the same conditions as the said stable, coach house, and premises, with the appurtenances, were then held at by plaintiff, according to the said agreement, and although the defendant then, in part performance of the said agreement, paid to plaintiff a portion of the 100*l*., to wit, 50*l*., and was then requested by plaintiff to accept and take the said messuage and premises, with the appurtenances, and the lease thereof, and to pay the residue of the said price, and also to accept and take the said fixtures, &c., and to cause a proper valuation, &c., and to pay the sum which should be settled in respect thereof, and also to accept and execute the said underlease of the stable, coach house, and premises, with the appurtenances, according to the said agreement: yet defendant did not nor would, when he was so requested as aforesaid, or at any other time, accept or take the said messuage and premises, with the appurtenances, or the said lease thereof, or cause a proper conveyance thereof to be prepared or tendered to the plaintiff, and did not nor would pay to plaintiff the residue of the 100*l*. or any part thereof, and did not nor would accept or take the

[*871

said fixtures, &c., or cause to be made any proper valuation thereof, or pay to plaintiff the price thereof, or any part thereof, and did not nor would accept or execute the said underlease of the said stable, coach house, and premises, with the appurtenances, according to the said
*872] agreement: but *defendant then, and hitherto, hath wholly refused so to do, and therein and in each of the same several matters respectively hath wholly failed and made default. Whereby plaintiff, &c., (damage).

Pleas: Traverse of the agreement; and another plea, not material. Issues thereon.

On the trial, before Lord Campbell, C. J., at the Middlesex Sittings after last Hilary Term, the question ultimately appeared to be whether the defendant had bound himself to take the stables under any agreement valid within sect. 4 of the Statute of Frauds, 29 C. 2, c. 3. The plaintiff relied upon a correspondence which had taken place, and which, so far as it was considered material by the Court on the motion after mentioned, sufficiently appears by the judgment.

A verdict was taken for the plaintiff, with leave to move as after mentioned.

In last Easter Term, *Watson*, for the defendant, obtained a rule calling on the plaintiff to show cause why the verdict "should not be set aside, and a nonsuit entered instead thereof, on the ground that there is no sufficient contract in writing signed by the defendant or his agent thereunto lawfully authorized."

In last Easter Term,(*a*) *Alexander* and *Badeley* showed cause, and *Watson* and Garth were heard in support of the rule. The following authorities were referred to: Dobell *v.* Hutchinson, 3 A. & E. 355 (E. C. L. R. vol. 30), Boydell *v.* Drummond, 11 East, 142, Clinan *v.* Cooke, 1 Sch. & Lef. 22, Brodie *v.* St. Paul, 1 Ves. Jun. 326, Tawney *v.*
*873] *Crowther, 3 Bro. Ch. Ca. 161, 318, Ogilvie *v.* Foljambe, 3 Mer. 53, Western *v.* Russell, 3 Ves. & B. 187, Saunderson *v.* Jackson, 2 B. & P. 238, Jackson *v.* Lowe, 1 Bing. 9 (E. C. L. R. vol. 8), Sugden's Concise and Practical View of the Law of Vendors and Purchasers, p. 85, Soames *v.* Spencer, 1 Dowl. & R. 32 (E. C. L. R. vol. 16), Shippey *v.* Derrison, 5 Esp. N. P. C. 190, Maclean *v.* Dunn, 4 Bing. 722 (E. C. L. R. vol. 13), Richards *v.* Porter, 6 B. & C. 437 (E. C. L. R. vol. 13), Archer *v.* Baynes, 5 Exch. 625.†

The question having entirely turned on the effect of the correspondence, which sufficiently appears from the judgment, a further report of the argument appears to be unnecessary. *Cur. adv. vult.*

ERLE, J., now delivered the judgment of the Court.

In this case the question was, Whether the evidence showed a contract by the defendant binding according to the Statute of Frauds.

(*a*) The case was argued on April 28th and 30th, 1856, before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.

We take the facts to be that the defendant employed Mr. Reardon as his agent, to make an agreement for him with the plaintiff for taking Hamilton Lodge, and did not give him authority to agree for certain stables in Gore Lane. That Reardon, as agent for the defendant, and in his name, agreed with the plaintiff to take Hamilton Lodge and the stables in Gore Lane, and received from the plaintiff a written copy of that agreement, signed with his name, dated 31st of August; and he then paid to the plaintiff a check for 50*l*., as earnest money on the part of the defendant to bind this agreement, and afterwards represented to the defendant that *he had agreed for the Lodge without the [*874 stables in Gore Lane, according to a proposal of the plaintiff dated 30th August. As Reardon had no authority to agree for those stables, this agreement would not bind the defendant unless he ratified and signed it within the Statute of Frauds: and so the question has been, Did the defendant so ratify and sign?

As to this, it appears that the plaintiff, in consequence of some dispute with Reardon, wrote to the defendant complaining thereof, and enclosing a copy of the agreement signed by himself and left with Reardon on 31st August, and asking the defendant to perform it. To this the defendant answered, stating, inter alia, that he believed the agreement shown to him by Reardon did not comprise the stables, but, whatever it was, he returned it to Mr. Reardon, and it would speak for itself; and he was fully prepared to carry it out. To this the plaintiff replied, explaining that the defendant referred to an instrument of the 30th of August, and that Reardon on the 31st had stated that the defendant required the stables, and had agreed for them, and that the instrument dated the 31st, of which a copy had been sent, was that agreement. To this the defendant referred, repeating his former doubts, but adding, inter alia, passages to the following effect. "The agreement, whatever it is and whatever its date, Mr. Reardon has; and it will speak for itself; and, whatever it is, I shall carry it out. With respect to the authority I gave Mr. Reardon after his telling me he had got me Hamilton Lodge on terms of valuation, I left everything to him, desiring him to do the best for me he could. What he has done for me I know not; but of course I must support him in all he has done for me, except *incivility. Having thus left everything to Mr. Rear- [*875 don, as my agent, and being in ignorance of everything he has done, except what I learn from your letters and my lawyer's, I should not act rightly if I were to interfere with any arrangement he has made, or interfere with any differences, until I learn his side of the question. Until I got my lawyer's letter, I could not understand what the difference was: but now I see the question is, whether the Gore Lane stables are included in my agreement. And, in answering your first letter, I did not think I was encroaching on Mr. Reardon's authority in saying that the agreement which he held would decide the question. With

respect to my taking the stables in Gore Lane, that seems to me to depend on two questions: 1st, whether they are within the agreement under which I am to take Hamilton Lodge; and, if they are, I must of course take them whether I like them or not: if they are not, will you keep your offer open," &c.

This letter, signed by the defendant, appears to us to be a ratification of the contract made by Reardon, and binding within the Statute of Frauds. The defendant was fully aware of the question in dispute between Reardon and the plaintiff, and, with that knowledge, he expressly adopted Reardon's act. He had received contradictory accounts from Reardon and the plaintiff: he does not know what the contents of the agreement are; but, without that knowledge, he was capable of adopting them; and in our opinion he did so. After the receipt of that letter we think that the plaintiff was bound to perform the agreement, and might have been sued by the defendant if he had refused so to do. It *876] follows that there was an agreement between the parties: *and we think the letter of the defendant above mentioned to be a compliance with the statute. Therefore this rule must be discharged; and the judgment for the plaintiff stands.

This is the opinion of the majority of the Court: but my brother Crompton desires me to add that he is not prepared to assent to it.

WATERFALL and Others *v.* PENISTONE. *July* 3.

J. mortgaged to M. the freehold of a mill, with machinery thereon. Afterwards J. assigned to defendant the equity of redemption, and certain machinery which had been fixed in the mill since the first mortgage. Afterwards, by indenture, in consideration of 500*l.* paid to J. by defendant, J. did bargain, sell, assign, and set over to defendant machinery erected since the conveyance of the equity of redemption, subject to redemption on payment of the 500*l.*; and, by the same indenture, J. covenanted that the mill and machinery specified in the previous conveyance of the equity of redemption should be charged with the 500*l.*, as well as the money before secured upon it.

The machinery comprised in the last-mentioned indenture was erected for the purpose of carrying on the manufactory in the mill: and, for the more conveniently so doing, a part of it was screwed, nailed, and otherwise fixed to the mill.

J. became bankrupt; in anticipation of which, defendant took possession, and entered on the mill and the machinery, J. having been in possession for more than twenty-one days after the making of the indenture, up to the time of such entry. The machinery comprised in the last-mentioned indenture still remaining on the premises, J.'s assignees claimed it, on the ground that such indenture had not been registered under stat. 17 & 18 Vict. c. 36.

Held, that they were entitled to the machinery: the conveyance thereof being void as against them for want of registration; for that, under the interpretation clause (Sect. 7), the machinery was personal chattels, as the intention of the parties appeared to be that the machinery should pass, separately from the realty, and so it had not become parcel of the freehold by annexation subsequent to the conveyance of the equity of redemption.

By order of Wightman, J., and by consent of the parties, the following special case was stated for the opinion of the Court.

The plaintiffs are the creditors and official assignees of the estate and effects of William Jenkinson, late of, &c., paper maker, dealer and

chapman, a bankrupt: and they bring this action against the defendant to recover from him certain machinery, matters, and things contained in the schedule hereinafter set forth.

*The freehold of the mill called Spring Grove Mill, hereinafter mentioned, was conveyed to the said William Jenkinson by indenture dated the 21st February, 1847. [*877

By indenture dated on the following day, the said W. Jenkinson mortgaged the freehold of the said mill to a Mr. Marsh for 2990*l.* And, by indenture dated 1st November, 1850, the said W. Jenkinson gave to the said Mr. Marsh a further charge for 1000*l.* upon everything comprised in his prior mortgage: and for further security he assigned to the said Mr. Marsh certain machinery then upon the said premises.

By indenture of the 14th September, 1853, the said W. Jenkinson conveyed and assigned to the above-named defendant, subject to Mr. Marsh's mortgage and further charge as aforesaid, the equity of redemption of the said mill, and all the machinery included in the said deed of 1st November, 1850. And, by the same deed, the said W. Jenkinson also assigned to defendant certain machinery which had been erected and fixed in the said mill subsequently to the said 1st November, 1850.

By an indenture made on 14th August, 1854, between the said W. Jenkinson of the one part and the defendant of the other part (endorsed upon the said last-mentioned indenture, dated 14th September, 1853), it is provided that, in consideration of 500*l.* to the said W. Jenkinson paid by the said defendant, the said W. Jenkinson did bargain, sell, assign, and set over unto the said defendant the machinery, matters and things described in the schedule hereinafter set forth: to hold the same unto the said defendant, his executors, administrators, and assigns, subject to redemption upon payment by the said W. Jenkinson, his executors, administrators, and assigns, *of 500*l.* and interest on the day and in manner therein mentioned. [*878

By the same indenture, the said W. Jenkinson, for himself, his heirs, executors, administrators, and assigns, covenanted with defendant, his executors, administrators, and assigns, that certain pieces of land, messuages, head and fall of water, mills, hereditaments, and premises, the same being of freehold tenure of which the said Spring Grove Mill was a part, and the machinery, matters and things mentioned, specified, and contained in the said indenture of 14th September, 1853, and in the schedule thereto (which last-mentioned machinery, matters, and things were the goods of the said W. Jenkinson, and are described in the said deed of 14th August, 1854, by the said schedule hereafter set forth), should stand charged with, and be subject and liable to, and should continue and remain vested in the said defendant, his heirs, executors, administrators, and assigns, for the purpose of securing to him and them, as well the said sum of 500*l.* and interest, as of the said principal moneys and interest, and costs, in and by the said indenture of the 14th Sep-

tember, 1853, secured. And the said W. Jenkinson, for himself, his heirs, executors, administrators, and assigns, covenanted with defendant, his executors, administrators, and assigns, for payment, on 14th September, 1854, of the said sum of 500*l.* and interest.

The following is a copy of the schedule in the said indenture of 14th day of August, 1854. "One paper machine to make 72 inches paper wide when dry, consisting of sand strainer, 4 feet wide, plate knotter 20 inches broad, with vat for ditto, shake with 35 brass rollers, 1½ inch
*879] diameter, copper breast roller, 10 inch *diameter, 9 copper rollers for the wire, from 3½ inches to six inches diameter, with all the necessary fixings, polished brass deckels, and india rubber straps, elevator to lift the water back from the wire, coucher with bottom bowle of sycamore, 12 inches diameter, 1 dry press bottom bowle, 12 inches diameter, top bowle, 20 inches diameter, prepared to be heated by steam, polished brass junctions, drying machine, consisting of 3 cylinders of 4 feet and 6 inches in diameter, each with framing, and all the necessary iron and wood rollers, polished brass steam and condensed water junctions, 3 smoothing rollers of 9 inches in diameter each, steam piping for the cylinder and bowles, gearing to drive the whole machine, and reeling apparatus, with 2 wood reels for winding the paper on, with slitters at the end, with 8 steel knives, water wheel, 12 feet diameter by 3 feet wide, with all the necessary gearing and coupling to drive the paper machine, 3 beating rag engines, all complete with bottom plates and driving gear, one pulp vat, one conical willow, one pair of iron rolls with standards and driving gear, one 34 feet by 4 feet steam boiler, with pipes leading to the machine for heating the drying cylinder belonging thereto."

A plan and accompanying description of the machinery, comprised in the above-written schedule, to be taken as part of the case.

The parts of the description particularly referred to in argument were the following.

"A machine or engine for manufacturing paper from the pulp." "This frame" (a cast iron truss frame to which a part of the machine was attached) "is cast with bed plates or sole pieces bedded on the ashlar, and fixed with wrought iron bolts, seven inches long, let into the
*880] *stone, and fastened with lead run in when in a molten state; the frame work is then secured by nuts screwed on to the bolts."

"A machine termed a willow." "The machine is supported, and the shaft works on cast iron truss frames with enlarged sole pieces; these sole pieces have holes cast in them for the purpose of being bolted to the floor; but they have not been so bolted, the weight of the machine itself being found sufficient to secure it from movement."

"Three machines for converting rags or other material into pulp."

"These machines, with the cast iron stanchions or frame work which support the shafting, are secured to the floor by screws and nails."

The case proceeded as follows.

The plan and detailed description comprise the whole of the machinery, matters and things, which is included in the indenture of 14th August, 1854, alone, but do not comprise any portion of the machinery, matters or things included in the first mortgage to the defendant, which is dated 14th September, 1853, and which is not disputed.

The said indenture of the 14th of August, 1854, and the said schedule, were not, nor were any copies thereof, filed within twenty-one days from the making or giving of such indenture with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench pursuant to the provisions of the Act, &c. (17 & 18 Vict. c. 36, "for preventing frauds upon creditors by secret bills of sale of personal chattels.")

The sum of 500*l.* was not paid at the time appointed by the said indenture.

On 27th April, 1855, defendant, with the knowledge *of, and without any opposition by, the said W. Jenkinson, and in anticipation that Jenkinson might become bankrupt (although Jenkinson had not then committed any act of bankruptcy), entered upon the said mill called Spring Grove Mill (the same being part of the hereditaments hereinbefore referred to), for the purpose of taking, and he then took, actual possession of the machinery, matters and things comprised in the said indenture of 14th August, 1854, and in the said indenture of 14th September, 1853, the whole of the same machinery, matters and things being then in and upon the said mill, and having been, from the date of the said indenture of 14th August, 1854, up to the time of such entry, in the exclusive and continuous possession of Jenkinson. [*881

On 28th April, 1855, the said W. Jenkinson presented his petition to the Leeds District Court of Bankruptcy, and was, on the same day, duly found and declared a bankrupt. The plaintiffs were duly chosen creditors and official assignees of the estate and effects of the said W. Jenkinson.

At the time of the presentation of the said petition, and at the time when the said W. Jenkinson was so declared bankrupt, the defendant was in possession of the said machinery, matters and things; and no part thereof had been removed from the said mill: and Jenkinson was in actual occupation of the said mill, subject to the possession of the said machinery, matters and things so taken by the defendant as aforesaid.

At the time of such entry, the said mortgage and further charge of the said Mr. Marsh were in full force: but he had not acted upon them, or taken possession under them.

*882] *The question for the opinion of the Court is, whether the said indenture of 14th August, 1854, is or is not valid and good as against the plaintiffs, as such assignees as aforesaid, so far as regards the property in or right to the possession of the machinery, matters and things therein comprised (and not included in the indenture of 14th September, 1853), and specified in the schedule thereto, or any part thereof.

The Court to be at liberty to draw all inferences of fact in the same way in which a jury would have done. The judgment of the Court to be executed in accordance with a certain agreement between the parties, bearing date 9th day of August, 1855.

The case was argued in last Term.(*a*)

R. Hall, for plaintiffs.—The question arises on stat. 17 & 18 Vict. c. 36. The preamble recites that "frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons, to the exclusion of the rest of their creditors." Then sect. 1 enacts that "every bill of sale of personal chattels made, after the passing of this Act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after

*883] the making of such bill of sale or at any future time, to seize *or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall" be filed, with the affidavit and descriptions there mentioned, within twenty-one days, with the officer of the Court of Queen's Bench; otherwise it shall be void as against the assignees, in bankruptcy or insolvency, of the owner of the goods, against sheriffs, &c., "so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy," &c., "and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale," &c. The bill of sale here has not been filed: but the defendant will contend that the case is not within the Act. First: it will be said that the subject of the bill of sale is not personal chattels. By the interpretation clause, sect. 7, "The expression 'personal chattels shall mean goods, furniture, fixtures, and other articles capable of complete transfer by delivery, and shall not include chattel interests in real estate, nor shares or interest in the stock, funds, or securities of any Government, or in the capital or property of any incorporated or

(*a*) May 27th, 1856. Before Coleridge and Erle, Js.

joint stock company, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same shall be at the time of the making or giving of such bill of sale." Now it is true that the paper machine and the beating rag engines are fastened to the building: but *this objection does not apply to the conical willow, which is kept in its place only by its own weight. Nor is it a valid objection as regards any of the articles. Some of them are, indeed, bolted or screwed to the freehold: but this annexation has obviously been made, not for the improvement of the freehold, but for the more convenient use of the annexed machines: and they are fixtures removable without injury being done to the freehold or the machines themselves: they are therefore "capable of complete transfer by delivery;" Ex parte Barclay, 5 De G. M. & G. 403, 410, Hellawell *v.* Eastwood, 6 Exch. 295, 312.† The object of the enactment was to secure to persons interested notice of change of property: the fact that here the party to whom the machines were transferred happened also to be owner of the freehold can make no difference as to the application of the enactment: a third party has no means of knowing whether the party in occupation of the freehold holds it for a chattel interest, or for life, or in fee. A second point which may be made for the defendant, and on which probably most reliance will be placed, is that there is in this case no "bill of sale" within the meaning of the Act. Now by the interpretation clause, sect. 7, "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same; marriage settlements; transfers, or assignments of any *ship or vessel or any share thereof; transfers of goods in the ordinary course of business of any trade or calling; bills of sale of goods in foreign parts or at sea; bills of lading; India warrants; warehouse keepers' certificates; warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented." On referring to the deed of 14th August, 1854, which comprehends the articles now in dispute (none of which were included in an earlier conveyance), it is manifest that the deed is within the definition of a bill of sale, and not within the exceptions. The case does not resemble that of a conveyance of real property to which the articles are annexed: the assignment is simply of the machinery as a distinct

[*884

[*885

subject of transfer. This distinguishes the case from Mather v. Fraser, 2 K. & J. 536, where it was held, by Wood, V. C., that no registration was necessary to pass the interest in machinery, fixed to the soil, which was comprehended in a mortgage of the soil. The Vice Chancellor appears there to have looked to the intention of the parties, which seems to have been that the machinery should pass with and as part of the freehold. Here the reverse appears: the assignment of the machinery in question is made eleven months after the assignment of the equity of redemption of the freehold: and possession of the machinery is taken separately. Such circumstances were considered, in Trappes v. Harter, 2 Cr. & M. 153, 181, as important in showing that the *machinery did not pass as part of the freehold. That decision has indeed been questioned, but not as to the principle for which it is now cited: and the language of Lord Chancellor Cranworth in Ex parte Barclay, 5 De G. M. & G. 411, 412, supports the same view. The last question is whether, within the meaning of sect. 1, this machinery, after the expiration of the twenty-one days, was "in the possession or apparent possession of the person making such bill of sale." By the interpretation clause, sect. 7, "Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving the bill of sale, so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person." Here the machinery did remain upon the premises.

*886]

Manisty, contrà.—The position of the parties is as follows. In 1847 Jenkinson mortgages the freehold to Marsh; and, in 1850, he gives Marsh a further charge on the property mortgaged, assigning at the same time, unnecessarily, but from extreme caution, certain machinery then on the premises. In 1853, Jenkinson assigns to the defendant the equity of redemption of the realty, with the machinery included in the preceding deed, and certain machinery since fixed. Here also the mention of the machinery was superfluous: the plaintiffs could not, in a Court of law, have claimed anything forming a part of the building: and all that afterwards *became attached to the realty would go with the realty. This state of things could not be altered by the deed of 1854. Whether the machinery was the landlord's, or was tenant's fixtures, the assignees could not take it. But reliance is placed on the supposed intention of the parties, which is said to point to a conveyance of the last machinery as a security distinct from that on the realty. But this is to lose sight of the covenant, which subjects the realty and machinery previously conveyed to the new charge. It may be admitted that the language of the deed of 1854 would, if looked at by itself, bring it within the statute: but, where it appears that

*887]

Jenkinson had only an equitable interest in what he then professed to assign, it follows that the covenant is at law the only binding part of the deed. The case thus really falls within the principle of Mather *v.* Fraser, 2 K. & J. 536. The mischief which the Legislature intended to obviate is met when it is understood that the machinery is part of the freehold. [ERLE, J.—If the mortgagor, before the last deed was executed, had quitted the premises, could he not have taken with him the machinery which had been placed on the premises since the execution of the last preceding deed?] He clearly could not. According to the old law, even a tenant could not, upon quitting, have removed articles so attached: that rule has been modified as between tenant and landlord; but, as between mortgagor and mortgagee, the mortgagor, who occupies merely by the permission of the mortgagee, has no such power of removal. If the defendant had redeemed the mortgage of 1847 he would have become legal owner of this machinery. There being no such redemption, Marsh, the first mortgagee, is the legal owner. The application of an express covenant by tenant *to deliver up to landlord "fixtures, and articles in the nature of fixtures," was discussed in Elliott *v.* Bishop, 10 Exch. 496,† in Exch.;(*a*) and the different kinds of fixtures are there defined: but no such fixtures as mortgagor's fixtures are alluded to. [ERLE, J., referred to Boydell *v.* M'Michael, 1 C. M. & R. 177.†] There, the mortgage [*888

expressly including tenant's fixtures, it was held that they were not within the order and disposition of the bankrupt mortgagor. Upon a mortgage of trade premises, trade fixtures erected after the mortgage pass to the mortgagee; Ex parte Cotton, 2 Mon. D. & De G. 725. [COLERIDGE, J.—But here we have the interpretation clause.] If the defendant is entitled to judgment in respect of any class of the machinery, he is so as to all; for no distinction can be made; Fisher *v.* Dixon, 12 Cl. & F. 312, 330.

R. Hall, in reply.—The utmost that the argument for the defendant asserts is that the last deed was a declaration of trust without transfer. If so, by the language of the interpretation clause a registration was necessary. It is contended that these articles passed as connected with the freehold: but the contrary is expressly laid down in Hellawell *v.* Eastwood, 6 Exch. 313.† Besides, it is absurd to suppose that the defendant would have advanced 500*l.* for the purpose of enlarging the interest of the first mortgagee; so that the last deed is at any rate conclusive as to the intention of the parties. *Cur. adv. vult.*

ERLE, J., now delivered the judgment of the Court.

In this case the plaintiff claimed the machinery assigned to the defendant by the bankrupt by indenture *dated 14th August, 1854, on the ground that it was a bill of sale within stat. 17 & 18 Vict. c. 36, and had not been enrolled: and, as it purports to be in- [*889

(*a*) See Bishop *v.* Elliott, in Error; 11 Exch. 113.†

terms a bill of sale, the plaintiffs must succeed unless the defendant brings himself within some exception.

Accordingly, he has contended that the machinery and other things comprised in this deed were not personal chattels within the meaning of this statute, being fixtures annexed to the freehold and passing therewith. But it appears to us that, although they were in one sense fixtures, being affixed to the soil, yet they were within the statute, which, by sect. 7, interprets personal chattels to mean fixtures capable of complete transfer by delivery.

It appears by the case that they were machinery affixed only for purposes of trade, therefore trade fixtures: and the bill of sale to the defendant, under which he makes title, treats them as machinery which the bankrupt had a right to sell distinct from the land. In Hellawell *v.* Eastwood, 6 Exch. 312,† the question, whether the trade machinery there described, which was annexed to the soil, was liable to be distrained, was answered in the affirmative, on the ground that, if the purpose of the annexation was not the permanent improvement of the dwelling, but the more complete use temporarily of the machinery, it was a chattel, and that the intention of the party in the annexation was material to be considered for deciding whether it became parcel of the realty. According to that decision, we hold this machinery to have been a personal chattel within the statute, notwithstanding the annexation to the soil.

*890] It was further contended, for the defendant, that, as *the land with the machinery *then thereon* had been mortgaged by the bankrupt to Mr. Marsh in February, 1847, and a further charge on the same premises with the machinery *then thereon* had been made by the bankrupt to Mr. Marsh in November, 1850, and as, by deed of 14th September, 1853, the bankrupt had charged his equity of redemption in the premises so mortgaged to Mr. Marsh, and certain other machinery *then erected thereon* as a security to the defendant, and, by the deed of August, 1854, had assigned the machinery *then on the premises* (being that now in question) to the defendant, to secure a further advance of 500*l.* made by him, and had further charged his equity of redemption in the premises before charged to the defendant to secure this 500*l.*, therefore the result of the whole transaction was equivalent to a mortgage of the premises with the machinery in question thereon to the defendant, and so the deed was not a bill of sale, according to the decision of Wood, V. C., in Mather *v.* Fraser, 2 K. & J. 536, 21st February, 1856, in which it was held that a mortgage of land with the machinery thereon was not a bill of sale of the machinery within the statute. With that decision we agree: but we think it does not apply to the indenture of the 14th August, 1854, which first created a primary charge on the machinery now in question, distinct from the land, by way of bill of sale, and afterwards created a separate secondary

charge on the equity of redemption by another part of the same instrument.

It was further suggested that this machinery might have passed to the mortgage of the freehold as parcel thereof, though annexed after the mortgage: but the tenor of the instrument shows that the parties did not *so intend: and trade fixtures, as above described, would not by subsequent annexation become parcel of the freehold, according to Hellawell *v.* Eastwood above cited. Our judgment therefore is for the plaintiffs. [*891

Judgment for the plaintiffs.

CASHILL *v.* WRIGHT. *July* 3.

Where the goods of a guest at an inn are lost, the innkeeper is liable as for breach of duty unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances. Where there is such negligence, the innkeeper is not responsible.

Therefore, where an innkeeper set up such negligence, in answer to an action by the owner for the loss of goods, and the Judge told the jury that the innkeeper was responsible unless there had been gross negligence on the part of the owner, but did not explain what would constitute gross negligence: Held, a misdirection, insomuch as the jury might have understood that the plaintiff was entitled to recover unless there had been an absence, on his part, of even the loosest degree of care.

THIS was an action brought in the Court of Record for the trial of civil actions within the city of Manchester. The declaration was for the loss of plaintiff's cash, gold watch and chain, stolen from him while he was abiding and putting up as a traveller in an inn of which defendant was proprietor. Pleas: 1. Not guilty: 2. That the money, &c., at the time when, &c., was in plaintiff's exclusive custody and possession. Issues on both pleas. On the trial, before the Recorder of Manchester, it appeared that plaintiff had passed a night at the inn, as a guest: and, in the course of the night, a watch and some sovereigns, his property, and which he had at the inn, were stolen by a person who was afterwards tried for the theft and convicted. The defence was, that the loss had been occasioned by the negligence *of the owner, who had shown some money (whether including the money lost did not distinctly appear) in the commercial room of the inn, and had afterwards placed his watch on the table in his bed-room, leaving the door of the bed-room ajar. The sovereigns which were lost were in a paper in a pocket of the plaintiff's trousers, which lay on a chair in the room. The person who stole the money had obtained admission, as a guest, during the night. The Recorder directed the jury to find for the plaintiff, unless they were of opinion that there had been gross negligence on his part; but the Recorder did not explain what would constitute gross negligence. Verdict for the plaintiff. [*892

Hugh Hill, in last Hilary Term, obtained a rule calling on the plaintiff to show cause why a new trial should not be had: "on the ground of misdirection in this, that the learned Recorder directed the jury that, if they did not think the conduct of the plaintiff amounted to gross negligence, he was entitled to their verdict; whereas the Recorder should have directed the jury that, if there was negligence on the part of the plaintiff conducing to the loss, the defendant was exonerated; also, that the Recorder should have explained what constituted gross negligence."

In last Easter Term,(*a*)

Wheeler and *Joseph Kay* showed cause.—The Recorder was right in directing the jury to find for the defendant if they considered that there was gross negligence on the part of the plaintiff. That was the *893] *direction in Armistead *v.* Wilde, 17 Q. B. 261 (E. C. L. R. vol. 79), which was approved of by this Court. [Lord CAMPBELL, C. J.—No doubt that case proves that gross negligence on the part of the plaintiff would furnish a defence: but will not a lesser degree of negligence do so? WIGHTMAN, J.—That point is expressly left undetermined by Lord Campbell, C. J., in his remarks at the end of that case.] Here in fact no negligence appeared, sufficient to raise a defence. [WIGHTMAN, J.—You cannot put that as a proposition of law.] The Court will not order a new trial if they see that substantial justice has been done. [Lord CAMPBELL, C. J.—But, if there has been a misdirection, how can we tell what the view of the jury would have been had they been rightly directed?] The question then is, whether any negligence on the part of the plaintiff, short of gross negligence, furnishes a defence. By the Roman law, and by the English law, at any rate as understood in the reign of Henry 8 and down to that of Elizabeth, the position of the innkeeper was considered to be similar to that of a carrier: he was responsible for the acts of his servants and of all his guests. "By the common custom of the realm hosts shall be charged for the goods of their guests lost or stolen out of their houses;" Reniger *v.* Fogossa, Plowd. 1, 9; Story On the Law of Bailments, sects. 488, 489. The loss of the goods is presumptive evidence of negligence on the part of the innkeeper or his servants, though subject to be rebutted by disproof, or by proof of negligence on the part of the owner. In Story On the Law of Bailments, sect. 470, it is said: "By the common law innkeepers are bound to take, not merely ordinary care, but uncommon care, of the goods, money, and baggage of their *894] guests; and *they are responsible for the acts of their servants and domestics, as well as for the acts of other guests." The same principles appear in Jones On the Law of Bailments, pp. 94, 95, 96. The recital of the writ in 1 Fitzh. N. B. 94 (B), which is cited in

(*a*) April 28th. Before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.

Calye's Case, 8 Rep. 32 a,(*a*) states the innkeepers' duty to their guests, "eorum bona et catalla infra hospitia illa existentia absque subtractione seu amissione custodire die et nocte tenentur, ità quòd pro defectu hujusmodi hospitatorum seu servientium suorum hospitibus hujusmodi damnum non eveniat ullo modo." And this is cited in Story On the Law of Bailments, sect. 470. Even if the host refuse to take charge of the goods because his house is full of parcels, he must make good the loss if the owner stop as a guest; Bennett *v.* Mellor, 5 T. R. 273. [Lord CAMPBELL, C. J.—That may be said on the hypothesis of there being no default on the part of the guest. WIGHTMAN, J.—In Calye's Case it is said that it is no excuse for the innkeeper to say that he delivered the key of the chamber to the guest.] That is much like the present case. In Warbrook *v.* Griffin, 2 Brownl. & G. 254, the same doctrine is assumed. It therefore becomes a mere question of words whether this is to be called gross negligence or not. [ERLE, J.—Can there be such a general rule? Must not the particular circumstances of the case be taken into consideration? Suppose an innkeeper tells his guest, "Take care of yourself, for some pickpockets have come into the place," and, after that, the guest leaves the door open.] In an Anonymous case in Moore, 78, pl. 207, it appears to have been held that, if an innkeeper tells his guest that persons resort to the inn of whose behaviour he is not sure, and offers the guests the key of the chamber at the guest's peril, refusing to take charge of the goods, the innkeeper is not discharged. This view is [*895 adopted in Blackerby's Cases in Law, 124. [Lord CAMPBELL, C. J.—In that case no negligence on the part of the guest is shown.] In Calye's Case, 8 Rep. 32 a, it is put thus: "It is no excuse for the innkeeper to say, that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber door open." [ERLE, J.—"Open," there, must mean "unlocked." CROMPTON, J.—You have to make out that if the jury had found the fact of some negligence, short of gross negligence, the plaintiff would have been entitled to recover. Lord CAMPBELL, C. J.—Gross negligence may be want of ordinary care; slight negligence, want of extraordinary care. The negligence, to constitute a defence, must be a negligence without which the loss would not have happened. WIGHTMAN, J., referred to Kent *v.* Shuckard, 2 B. & Ad. 803.] That case is strongly in favour of the plaintiff: there the guest left open the door of the bedroom, whence the purse was stolen, and a person in the adjoining room could thus see into the bedroom. [WIGHTMAN, J.—It does not appear how that case was left to the jury.] Lord Tenterden, however, there says that "the principle on which the liability of an innkeeper for the loss of the goods of his guest is founded, is, both by the civil and common law, to compel the innkeeper to take care that no improper person be admitted into

(*a*) See note on S. C., 1 Smith's Lea. Ca. 91 (4th ed.)

his house, and to prevent collusion between him and such person." [CROMPTON, J.—In Burgess *v.* Clements, 4 M. & S. 306(*a*) (E. C. L. R. vol. 30), Lord *Ellenborough says: "In general though a traveller who resorts to an inn may rest on the protection which the law casts around him, yet if circumstances of suspicion arise, he must exercise ordinary care."] *896] But he seems to put the decision on the guest there having taken "a special charge" of the property, not "in the ordinary character of a guest frequenting an inn." [WIGHTMAN, J.—He says, earlier: "There may be circumstances, as if the guest by his own neglect induces the loss, or introduces himself the person who purloins the goods, which form an exception to the general liability, as not coming within the words pro defectu hospitatoris, and under such circumstances the plaintiff shall not complain of the loss."] It is not necessary to dispute that. There appears to be no reason for objecting to the language used by the Recorder. The question must be one of degree; and the word "gross" seems to distinguish fairly such a degree as would deprive the plaintiff of the right to recover. It surely cannot be laid down, generally, that whenever there has been on the part of the plaintiff any negligence conducing to the loss the innkeeper is exonerated: were that so, there would have been a misdirection in Richmond *v.* Smith, 8 B. & C. 9 (E. C. L. R. vol. 15). The Recorder appears to have adopted the language which is to be found in 2 Saunders on Pleading and Evidence, 215 (2d ed., by Lush). In Batson *v.* Donovan, 4 B. & Ald. 21 (E. C. L. R. vol. 6), (the case of a carrier), the question whether there had been "gross negligence" or not was left to the jury without further explanation of the term: and the direction was upheld by a majority of this Court. In Duff *v.* Budd, 3 Br. & B. 177 (E. C. L. R. vol. 7), (also an action against a carrier), the *897] Judge told the jury *that "if the defendant and his servants had not taken the same care of the property as a prudent man would have taken of his own, he had been guilty of gross negligence:" and the direction was considered by the Court of Common Pleas to be right: and, if that definition of gross negligence be incorporated in the summing up in the present case, it is manifest that the direction was at any rate not too favourable for the plaintiffs. [CROMPTON, J.—But in Duff *v.* Budd the definition was given to the jury: here none was given.] The definition appears to have been adopted as a matter of law in Wyld *v.* Pickford, 8 M. & W. 443, 460, 1:† and this Court, in Hinton *v.* Dibbin, 2 Q. B. 646, 661 (E. C. L. R. vol. 42), said: "it may well be doubted whether between 'gross negligence' and negligence merely any intelligible distinction exists." In Story On the Law of Bailments, sect. 17, it is said: "negligence may be ordinary, or less than ordinary, or more than ordinary. Ordinary negligence may be defined to be the want of ordinary diligence, and slight negligence to

(*a*) Note to Farnworth *v.* Packwood, 1 Stark. N. P. C. 251, 2.

be the want of great diligence, and gross negligence to be the want of slight diligence." But in Wilson *v.* Brett, 11 M. & W. 113,† Rolfe, B., said that he "could see no difference between *negligence* and *gross negligence*—that it was the same thing with the addition of a vituperative epithet." And this seems to be confirmed by the language of the Court in Austin *v.* The Manchester, &c., Railway Company, 10 Com. B. 454, 474 (E. C. L. R. vol. 70).

Hugh Hill, contrà.—The Recorder ought to have told the jury to find for the defendant if there was, on the part of the plaintiff, negligence which occasioned *the loss and without which the loss would not have happened. That agrees with the language of Patteson, J., in Armistead *v.* Wilde, 17 Q. B. 265 (E. C. L. R. vol. 79). What the Recorder himself understood by gross negligence is doubtful. According to the passage last cited from Story (which agrees with Jones on the Law of Bailments, 21), the term is applicable only where no care, even the slightest, has been taken. So understood, the direction would amount to this: that the plaintiff was entitled to recover if he had shown care in the slightest particular. The true relation of the owner to the innkeeper appears from Burgess *v.* Clements, 4 M. & S. 306 (E. C. L. R. vol. 30): the innkeeper is liable only where the loss happens pro defectu hospitatoris, which cannot be where the owner's conduct produces the loss. There may of course be great negligence on the part of the owner which yet does not contribute to the loss; that might be inferred by a jury if the owner left his room door open; but no robbery had taken place from other rooms left open, and robbery had taken place from rooms not left open. The language in 2 Saunders on Pleading and Evidence, 215 (2d ed., by Lush), cannot be supported. [*898

Cur. adv. vult.

ERLE, J., now delivered the judgment of the Court.

In this case the plaintiff brought his action to recover damages for the loss of a watch and some sovereigns, supposed to have been stolen from his bedroom in the defendant's inn, where he was a guest. The defendant set up in defence certain acts of the plaintiff, alleged to have been negligent and to have occasioned or contributed to the loss.

*At the trial, before the learned Recorder of Manchester, the jury were directed that the defence failed unless they thought that the plaintiff had been guilty of gross negligence. [*899

A rule for a new trial having been obtained on the ground of misdirection, two questions were raised before us.

It was said, first, by the plaintiff's counsel, that the particular acts imputed to the plaintiff were of such a nature as not to amount to negligence, and that the learned Recorder should have directed the jury that there was no evidence of any negligence. If we were satisfied that there was no evidence to go to the jury of any negligence on the part of the plaintiff, we should be authorized in discharging the rule

for a new trial on that ground. But we cannot say that there was not some evidence on which the opinion of the jury ought to have been taken.

The other question was as to the alleged misdirection, in the direction to the jury that there must be gross negligence, to maintain the defence. It does not appear that there was any information given to the jury as to what they were to understand by gross negligence. If they were told to understand by gross negligence the absence of that ordinary care which, under the circumstances, a prudent man ought to have taken, as seems to have been the meaning given to gross negligence in some of the modern cases cited before us, the direction as to the degree of negligence might not have been objectionable: but the legal meaning of gross negligence is greater negligence than the absence of such ordinary care. It is such a degree of negligence as excludes
*900] the loosest degree of care, and is said to amount to dolus. *We think that the rule of law resulting from all the authorities is that, in a case like the present, the goods remain under the charge of the innkeeper, and the protection of the inn, so as to make the innkeeper *liable as for breach of duty unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances.* We think, therefore, that the direction in the present case cannot be supported; and that the rule for a new trial must be made absolute.

Rule absolute.

END OF TRINITY VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Michaelmas Term,

XX. VICTORIA. 1856.

The Judges who usually sat in Banc in this Term were:

Lord CAMPBELL, C. J. WIGHTMAN, J.

COLERIDGE, J. ERLE, J.

MEMORANDA.

SIR JOHN JERVIS, Chief Justice of the Court of Common Pleas, died at the close of the last Vacation.

He was succeeded, in this Term, by Sir Alexander James Edmund Cockburn, Her Majesty's Attorney-General, who was previously called to the degree of the coif, when he gave rings with the motto *Fiat justitia*. His Lordship was afterwards sworn in as member of Her Majesty's Privy Council.

In the same Vacation, Baron Platt resigned the office of Baron of the Court of Exchequer.

*He was succeeded, in this Term, by William Henry Watson, of Lincoln's Inn, Esquire, one of Her Majesty's counsel, who was previously called to the degree of the coif, when he gave rings with the motto *Militavi*. The learned Baron afterwards received the honour of Knighthood. [*902

In this Term,

Sir Richard Bethel, Knight, Her Majesty's Solicitor-General, was appointed to the office of Attorney-General, vacant by the promotion of Cockburn, C. J. And

The Right Honourable James Stuart Wortley, of The Inner Temple, one of Her Majesty's counsel, and Recorder of London, was appointed to the office of Solicitor-General, vacant by the promotion of Sir R. Bethell, Attorney-General. He resigned the office of Recorder.

ROBERT PYBUS *v.* HENRY GIBB, JOHN BOLTON, and WILLIAM HINDMARSH. *Nov.* 7.

A bond was executed by G. and two sureties conditioned for indemnifying the high bailiff of a county court against liabilities from the misconduct in his office of G., who was appointed by the high bailiff one of the bailiffs. At the time the bond was executed, the jurisdiction of the county court was regulated by stat. 9 & 10 Vict. c. 95. After the execution of the bond, the jurisdiction of the county court was extended and increased by stat. 10 & 11 Vict. c. 102, stat 12 & 13 Vict. c. 101, stat. 13 & 14 Vict. c. 61, and stat. 14 & 15 Vict. c. 52.

Held, that these statutes had so materially altered the nature of the office of bailiff that the sureties were no longer liable to indemnify the high bailiff, even though the misconduct of G. was in respect of a matter within the jurisdiction conferred by stat. 9 & 10 Vict. c. 95, in respect of which the duty of the bailiff was not altered by the subsequent Acts.

ACTION on the defendants' writing obligatory subject to a condition, "whereby, after reciting to the effect following, that the plaintiff had been duly appointed high bailiff of and for the County Court of Northumberland," "to be holden at Alnwick," "under and by virtue of an Act" (9 & 10 Vict. c. 95, 'for the more easy recovery of small debts and demands in England'), "and *that the said high bailiff had, in consideration of the security given by the said writing obligatory, appointed the said defendant, Henry Gibb, to act under and for him as a bailiff of the said court," "during the pleasure of the plaintiff, subject to be suspended or dismissed by the judge of the said court, it was and is conditioned that, if the defendant Henry Gibb did and should well and truly serve all summonses, judgments, orders, notices, and processes whatever issuing out of the said court and to him delivered for service, and execute all warrants, precepts, and writs, issuing out of the said court, and to the high bailiff of the said court, and other the bailiffs thereof directed, and to the said Henry Gibb delivered for execution, and did and should make true returns respecting such services, and execution, according to the general rules made or to be made for regulating the practice and proceedings of the said court, and did and should well and truly execute and perform the office and duties of bailiff of the said court, and in the execution and performance of such his office and duties conform to the provisions and requisitions of the said Act, and to all such general rules as had been or should from time to time be made for regulating the practice and proceedings of the said court, in respect of the office and duties of high bailiff, or other bailiff, of the said court, and, subject thereunto, to the orders and directions of the judge or of the high bailiff of the said court, and did not and

*903]

should not ask, demand, levy, or directly or indirectly receive any fee or fees, or other reward, for the service of any summons, judgment, order, notice, or process, or for the execution of any warrant, precept, or writ, or for the execution or performance of his office and duties as such bailiff as aforesaid, but such as is or are set down *in the schedule (D.) to the said Act annexed; and also did or should, [*904 without fee or reward, personally attend each and every of the said county courts which should be holden at Alnwick aforesaid, and not depart or absent himself therefrom without the leave of the judge of the said court, or the said high bailiff; and also did and should, from time to time, and at all times thereafter, save, defend, keep harmless and indemnified the said high bailiff, his heirs, executors, and administrators, of, from, and against all and all manner of actions, suits, attachments, fines, penalties, losses, costs, charges, and expenses which might be commenced, prosecuted, imposed, or set upon him or them, or which he or they might sustain, pay, or be liable to for or by reason of the serving or not serving, executing or not executing, returning or not returning, of any summons, judgment, order, notice, process, warrant, precept, or writ to him, the said Henry Gibb, delivered as aforesaid, or for or by reason of the non-execution or non-performance of his office and duties, as such bailiff as aforesaid, or for or by reason of his receiving or extorting any fee or fees, or any money or reward, other than such as is or are set down in the schedule (D.) to the said Act annexed, or for or by reason of any neglect, connivance, omission, act, or default of the said Henry Gibb, upon or by reason of any cause, matter, or thing in anywise relating thereto respectively, then the said obligation to be void and of no effect, but otherwise to be and remain in full force and virtue." Averments: that, while plaintiff was high bailiff, and after the making of the said writing obligatory, and while Gibb was bailiff, a warrant of execution was duly issued out of the county court directed to the high bailiff, to levy of the goods of one Edgar a debt of 11*l.* 4*s.* 9*d.* and costs recovered *by the judgment of the court, which [*905 warrant was delivered, under and by virtue of the said Act of Parliament, to Gibb, as such bailiff as aforesaid, to be executed; under colour of which warrant Gibb, as such bailiff within the district, wrongfully seized in execution, as and for goods of Edgar, certain goods of one Thew, which were not liable to be seized or sold under the warrant, and wrongfully sold the said goods as such bailiff under colour of the warrant, as goods of Edgar: for and by reason of which acts of Gibb, Thew afterwards brought an action in the Court of Exchequer of Pleas against plaintiff and Gibb, and recovered against the plaintiff and Gibb 20*l.* damages, and 152*l.* 12*s.* costs, which plaintiff was obliged to pay, and was not indemnified. The penalty was claimed.

Plea, by the defendants Bolton and Hindmarsh, that the writing obligatory was made and executed before the making and passing and coming

into force of certain Acts of Parliament, that is to say: stat. 10 & 11 Vict. c. 102; stat. 12 & 13 Vict. c. 101; stat. 13 & 14 Vict. c. 61; and stat. 14 & 15 Vict. c. 52; that the said several Acts of Parliament in this plea mentioned had been respectively made and passed after the making and execution of the said writing obligatory, and were respectively in force before and at the time of the issuing of the said warrant of execution as in the declaration mentioned, and thence until the commencement of this suit. And that, after the passing and coming into force of stat. 12 & 13 Vict. c. 101, and before the issuing of the said warrant, the judge of the said county court did, under and by virtue of the said last-mentioned Act of Parliament, by writing under his hand, authorize Gibb, as such bailiff as aforesaid, to act *as a broker or appraiser, for the purpose of selling or valuing any goods, chattels, or effects taken in execution under stat. 9 & 10 Vict. c. 95.

*906]

Demurrer. Joinder.

Hugh Hill now argued for the plaintiff.—The bond was taken by the high bailiff of a county court, for the good behaviour of his bailiff. At the time when the security was taken the duties of the bailiff, and the liabilities of the high bailiff, were regulated by stat. 9 & 10 Vict. c. 95, which created the county courts and gave them jurisdiction over all pleas of personal actions where the amount claimed did not exceed 20*l.*; sect. 58. Sect. 31 directed that for every such court there should be one or more high bailiffs; and it empowered the high bailiff of a county court to appoint bailiffs to assist him. Sect. 33 prescribes the duties and responsibilities of the high bailiffs. They shall, by themselves or their bailiffs, "serve all the summonses and orders, and execute all the warrants, precepts, and writs, issued out of the court: and the said high bailiffs and bailiffs shall in the execution of their duties conform to all such general rules as shall be from time to time made for regulating the proceedings of the court, as hereinafter provided, and, subject thereunto, to the order and direction of the judge; and the said high bailiffs shall be entitled to receive all fees and sums of money allowed by this Act in the name of fees payable to the bailiff, out of which they shall provide for the execution of the duties for which such fees are allowed, and for the payment of the bailiffs and officers appointed to assist them, according to such scale of remuneration as shall be from time to time approved by the judge; and every such *high bailiff shall be responsible for all the acts and defaults of himself and of the bailiffs appointed to assist him, in like manner as the sheriff of any county in England is responsible for the acts and defaults of himself and his officers." The breach of duty, in the present case, was that the bailiff Gibb, having a warrant in execution of a judgment of the county court for less than 20*l.*, in respect of a plaint within that Act, seized the goods of the wrong person, for which the

*907]

high bailiff was responsible. There can be no doubt that if this had happened before any fresh legislation, the sureties would have been responsible; but the plea shows that after the execution of the bond, and before this breach of duty, various other statutes, enumerated in the plea, have come in force. Now it cannot be disputed, since Oswald *v.* Mayor, Aldermen, and Burgesses, of Berwick upon Tweed, 5 H. L. Ca. 856, in Dom. Proc.,(*a*) that, if subsequent legislation has so altered the functions of the bailiff as to alter the nature of the suretyship, it is no longer the same office, and the sureties are discharged. But if the office and the duties remain unaltered, it is not material that new distinct duties or offices have been accumulated on the same person: the surety will not be liable for the breach of those new duties; but he is not discharged from liability in respect of the old duties. Thus here, by stat. 9 & 10 Vict. c. 95, s. 106, before any sale of goods taken in execution by a bailiff there was to be an appraisement by a sworn appraiser, for whom the high bailiff was responsible, and for whom he took sureties. Stat. 12 & 13 Vict. c. 101, s. 10, authorizes the judge of the court to permit a bailiff to act as appraiser: and it *appears by the plea that Gibb was so authorized, and consequently holds the two offices of bailiff and appraiser. The present sureties are not responsible for any misconduct by him as appraiser; but the mistake in seizing goods belonging to the wrong party is in no way connected with appraisement. So by stat. 10 & 11 Vict. c. 102, s. 5, the high bailiff becomes a messenger under the Court of Bankruptcy; and for the defaults of the bailiff acting for him as such the sureties are not liable; but the original office of bailiff, and the original duty, not to take the goods of the wrong party by colour of a warrant, remain unaltered; and for a breach of that duty the sureties are liable. [*908

Knowles, contrà.—The alterations both in the office and in the duties have been substantial, and are such as to alter the risk of his sureties. The condition is that Gibb shall properly "serve all summonses, judgments, orders, notices, and processes whatever issuing out of the said court and to him delivered for service, and execute all warrants, precepts and writs issuing out of the said court and to the high bailiff of the said court and other the bailiffs thereof directed, and to the said Henry Gibb delivered for execution." Process issuing out of the court under stat. 10 & 11 Vict. c. 102, or stat. 14 & 15 Vict. c. 52, which authorizes the arrest of absconding debtors, is within those words, and certainly never was within the contemplation of the parties. Again, under stat. 9 & 10 Vict. c. 95, the bailiff could not have a warrant in execution of a judgment for more than 20*l*. But after stat. 13 & 14 Vict. c. 61, the

(*a*) Affirming the judgment of Exch. Ch. in Mayor of Berwick *v.* Oswald, 3 E. & B 653 (E. C. L. R. vol. 77), which affirmed the judgment of Q. B. in Mayor of Berwick *v.* Oswald, 1 E. & B. 295 (E. C. L. R. vol. 72).

jurisdiction was increased to 50*l.*; sect. 1; and, by consent, to any amount; sect. 17: the liability therefore for not executing process might be much more serious. By the *condition the bailiff is to take no fees but those in schedule (D.) to stat. 9 & 10 Vict. c. 95. That table has been abolished and a new one substituted under stat. 12 & 13 Vict. c. 101, s. 6, and stat. 13 & 14 Vict. c. 61, s. 5; Pollock's County Court Practice, Part I. ch. 3, (3d ed.)(*a*) It is not possible, as proposed, to discriminate between the responsibilities of the bailiff under the old Act and under the existing law; but, if it were, the surety would nevertheless be discharged. In Bonar *v.* Macdonald, 3 H. L. Ca. 226, 238, which was an appeal from Scotland to the House of Lords, in the judgment of Lord Cottenham it is said, that the law of Scotland and England are the same, and that "the rule as extracted from the English authorities, Evans *v.* Whyle, 5 Bing. 485 (E. C. L. R. vol. 15), Eyre *v.* Bartrop, 3 Madd. 221, Archer *v.* Hale, 4 Bing. 464 (E. C. L. R. vol. 13), Whitcher *v.* Hall, 5 B. & C. 269 (E. C. L. R. vol. 11), is, that any variance in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety." In that case the defendant was surety that the teller of a bank should duly account to the bankers. Without the knowledge of the surety, the teller agreed with the bankers, for an increased salary, to become liable to one-fourth of any loss that might be incurred on bills discounted at the bank. It was held that the surety was discharged and was no longer liable for a default, though not in any way connected with discounting; and this on the ground that *the liability of the surety was varied. That was done by the act of the parties: but if the change be made by the Legislature it has the same effect. This was agreed on, in the Exchequer Chamber, by all the Judges in Mayor of Berwick *v.* Oswald, 3 E. & B. 653 (E. C. L. R. vol. 77). There was a difference of opinion as to the application of the doctrine to the facts. This Court,(*b*) a majority of the Judges in the Exchequer Chamber, and the House of Lords,(*c*) thought that the Legislature had not varied the nature or duties of the office so as to alter the responsibility of the surety, and that a change in the tenure was provided for by the language of the bond; but all agreed that a change in the nature of the office would discharge the sureties.

*909]

*910]

H. Hill was heard in reply. *Cur. adv. vult.*

Judgment was delivered on the following day.

Lord CAMPBELL, C. J.—This was a demurrer to a plea argued yes-

(*a*) And see stat. 19 & 20 Vict. c. 108, s. 78.

(*b*) Mayor of Berwick *v.* Oswald, 1 E. & B. 295 (E. C. L. R. vol. 72).

(*c*) Oswald *v.* Mayor, Aldermen, and Burgesses, of Berwick upon Tweed, 5 H. L. Ca. 226.

terday. The action was on a bond; the declaration set out the condition and assigned a breach. By this it appears that the plaintiff, being high bailiff of the county court of Northumberland, holden at Alnwick, had appointed Gibb, one of the defendants, his bailiff, and that the bond was by the bailiff, and the other defendants as his sureties, conditioned to indemnify the high bailiff for the liability in respect of the conduct of the bailiff in his office. There was a warrant issued out of the county court, directed to the high bailiff and other bailiffs of the court, requiring the levy of the goods of *Edgar, of a debt of 11*l.* 4*s.* 9*d.* for which judgment had been given against him, which was delivered [*911 for execution to the defendant Gibb as bailiff of the plaintiff for execution. Under colour of this warrant Gibb seized the goods of Thew, who recovered against the plaintiff: and the breach assigned was for not indemnifying the plaintiff against this. The plea, by the sureties, shows that the bond was executed when stat. 9 & 10 Vict. c. 95, was the Act regulating the county court; it alleges that several Acts came into operation after the execution of the bond, and before the breach of duty complained of; and on the demurrer we have to determine whether the effect of those Acts has been to produce such an alteration in the office that the sureties under the bond were discharged before breach.

The law on this subject was much discussed in the case of Oswald *v.* Mayor, Aldermen, and Burgesses, of Berwick upon Tweed, 5 H. L. Ca. 856, 3 E. & B. 653 (E. C. L. R. vol. 77), 1 E. & B. 295 (E. C. L. R. vol. 72); and it may be considered settled law that, where there is a bond of suretyship for an officer, and, by the act of the parties or by Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided. Even if the sureties were consenting parties by parol to such a change, it could hardly affect their liability under the bond. The question is, whether the nature and functions of the office or employment are changed; for, if they are, it is not the same office within the meaning of the bond. That was the doctrine laid down in the judgment of this Court in Mayor of Berwick *v.* Oswald, 1 E. & B. 295 (E. C. L. R. vol. 72). Some of the Judges in the Court of Exchequer Chamber (*a*) thought that this principle was wrongly *applied and the judgment erroneous: but all agreed that the [*912 principle was right: and the judgment was finally affirmed in the House of Lords.(*b*) Then, such being the general principle, we come to apply it to this case. When the bond was given the principal was bailiff of a county court, then having its jurisdiction under stat. 9 & 10 Vict. c. 95, and being a court "for the more easy recovery of small debts and demands," with a jurisdiction limited to 20*l.* The condition provides

(*a*) Mayor of Berwick *v.* Oswald, 3 E. & B. 653.
(*b*) Oswald *v.* Mayor, Aldermen, and Burgesses, of Berwick upon Tweed, 5 H. L. Ca. 856.

for the due execution by Gibb of his office as bailiff according to that Act, and "all such general rules as had been or should from time to time be made for regulating the practice and proceedings of the said court, in respect of the office." Not, be it observed, according to such Acts of Parliament as might be made respecting the office. Then, the court and the office being of this nature, and such being the condition, various statutes are passed. By these the jurisdiction of the court is raised from 20*l.* to 50*l.*; and by consent the court may take cognisance of a cause to any amount. This extension of jurisdiction, since the bond was given, makes the court no longer one merely for the recovery of small debts and demands. Then, under stat. 9 & 10 Vict. c. 95, s. 106, the bailiff might not sell goods taken in execution without a sworn appraisement. By a subsequent Act the bailiff himself may act as a broker; and the intervention of a third person as sworn appraiser is no longer required. By other Acts jurisdiction in bankruptcy is transferred to the county court; and, by another Act, power to arrest absconding debtors is given. Under these latter Acts the bailiff may have to execute warrants directed to him, involving liabilities not of 20*l.* only but *of any amount. By another enactment, the fees are no longer to be regulated by schedule (D.) to stat. 9 & 10 Vict. c. 95; and this is important, as the condition is express that the bailiff is to take no fees save those authorized by that schedule. I think we cannot consider that as not an essential part of the condition. There being then an increase in the jurisdiction of the court as to amount, a change in the nature of the court by giving bankruptcy jurisdiction and jurisdiction over absconding debtors, and the table of fees being altered, I think that the office is essentially changed, and the sureties no longer liable. It was said that the breach here was one for which the sureties would have been liable if the office had remained unchanged. I think it would be most inconvenient if the sureties were liable for the breach of the original duties of the office, and not for those superadded, so as to require discrimination as to the duties all performed by the same officer in the same office. But we need not discuss that; for we have the express authority of the House of Lords upon it in Bonar *v.* Macdonald, 3 H. L. Ca. 226. That was on appeal from Scotland; but on this subject the laws of the two countries are essentially the same. It was not the case of an office but of an employment: fresh duties had without the consent of the surety been added to the employment; and then the principal made a default that was within the scope of his original employment; for that default the action was brought: it was argued there, as here, that the liability should be the same as before; but the House of Lords, affirming the judgment below, held that after the addition of fresh duties the employment was essentially altered, and the sureties *discharged. That is precisely in point. There is no inconvenience; for, when an Act of Parliament alters the

*913]

*914]

duties of an officer, it will be easy to require him to give fresh sureties, or the surety bonds may be framed as suggested by Maule, J., in Mayor of Berwick *v.* Oswald, 3 E. & B. 665 (E. C. L. R. vol. 77), so as to continue the liability of the sureties, whatever alteration might take place by act of the Legislature. As it is, I think the liability of the sureties on this bond at an end.

COLERIDGE, J.—I am of the same opinion, and have but little to add. The liabilities and rights of sureties have often been considered in England; and many points are well established. One is, that, when the nature of the employment of the principal is so altered, by the act either of his employer or of the Legislature, that the risk of his surety is materially altered, the surety has a right to say, "I did not bargain for this risk; I am discharged." This seems to me to depend on the broad principles of justice. Mr. *Hill* did not dispute this, but argued that here, admitting that other duties were added as to which there would be fresh risk, the surety was not affected, as his bond would not extend to those added duties and risk. If this were so, in fact, the decision in Bonar *v.* Macdonald would be directly in point and against the plaintiff. But I do not concede to Mr. *Hill* that the risk of a surety stipulating for the conduct of a principal is not affected by the principal incurring collateral liabilities. Let any man say if he would think it the same thing to become surety for a person who was exposed to collateral liabilities as for one who was not. The chance of the solvency of the *principal is a great element in the risk; it may well be that Gibb could have made good every loss incurred by his defaults in executing warrants under 20*l.*, were it not that he has lost the means by liabilities incurred in executing those under the new Acts. At all events that must affect the risk of his sureties. [*915

WIGHTMAN, J.—It may be taken as a principle of law that a bond by a surety, conditioned for the due performance by his principal of the duties of an office, is rendered null if the office or its duties are so altered as in any degree to increase or vary the risk of the surety to his possible disadvantage. The principle is recognised in many cases; but the late case of Oswald *v.* Mayor, Aldermen, and Burgesses of Berwick-upon-Tweed may be considered the leading case upon the subject, as it was ultimately decided in the House of Lords.

The question in this case is, whether this principle is applicable to it, and whether there has been such an alteration in the office of the principal in the bond, or his liabilities, as will bring this case within the principle, and discharge the sureties.

The bond recites that the plaintiff was appointed high bailiff of the County Court of Northumberland, under stat. 9 & 10 Vict. c. 95, and had appointed Gibb (the principal in the bond) to act for him as bailiff of the court, and was conditioned, amongst other things, for the due execution by him of all warrants, precepts, and writs issuing out of the

court, and directed to the high bailiff and delivered to Gibb, and that
*916] the defendants would indemnify the plaintiff from all actions *and losses which he might be liable to for executing or not executing any warrant or writ delivered to Gibb, or for or by reason of the non-performance of the office and duties as such bailiff: it is then assigned as a breach of duty that, under a warrant of execution of judgment obtained in a suit within the jurisdiction of the court by virtue of stat. 9 & 10 Vict. c. 95, for a debt of 11*l.* 4*s.* 9*d.*, with costs, against one Edgar, Gibb had wrongfully seized and sold the goods of one Thew, and thereby subjected the plaintiff to an action at the suit of Thew, who had recovered damages and costs against him. For the defendants it was contended that the court and the office of bailiff, as they existed at the time of the making of the bond, had been so changed, and the duties so altered and increased, that the defendants were discharged from liability under the bond; and they relied upon the effect of several subsequent statutes altering and enlarging the jurisdiction of the court and the duties of the officers, including the bailiff.

By stat. 13 & 14 Vict. c. 61 the jurisdiction of county courts is extended from 20*l.* to 50*l.*, and by consent to any amount, and the powers and provisions of stat. 9 & 10 Vict. c. 95 are extended to the increased jurisdiction. By stat. 10 & 11 Vict. c. 102, s. 5, the high bailiff of the county court and his assistants are to act as messengers in bankruptcy, under the provisions in that Act, which gives a new jurisdiction to the county court in bankruptcy and insolvency; and by stat. 14 & 15 Vict. c. 52 the judges of the county court may grant warrants for the arrest of absconding debtors, to be executed by the bailiffs. The effect of these statutes is no doubt greatly to enlarge the
*917] duties of the *bailiffs, and especially with respect to the execution of warrants and process from the county court. The words of the condition as to the duty of Gibb to execute warrants and other process are very general. He is duly to execute all warrants so issuing out of the court and directed to the high bailiff, and delivered to him, Gibb, to be executed. These are general words, and would include warrants under the increased jurisdiction; but it is admitted that the surety would not be liable in respect of them, but that the liability is limited to such warrants as issue from the court under its original jurisdiction given by stat. 9 & 10 Vict. c. 95; and it is contended that, to the extent of the 20*l.* jurisdiction by that statute, the court and the office of bailiff remain the same as under stat. 9 & 10 Vict. c. 95. But it appears to me that this is a fallacy, and that neither the court nor the office of bailiff are the same after the extension of the jurisdiction to 50*l.* The court, as constituted under stat. 9 & 10 Vict. c. 95, was for the more easy recovery of small debts and demands, limited by the statute to 20*l.* If the court had been converted into a court for recovery of demands to an unlimited amount it would hardly be considered

as the same court, though, as omne majus continet in se minus, it would still be a court in which small demands might be recovered. Small sums may be recovered in the Courts at Westminster; but they are not therefore considered Courts for the recovery of small debts. Suppose, instead of increasing the amount to be recovered, the jurisdiction of the court had been extended over a dozen additional counties, and the duties of the bailiff vastly increased: could the court and the officer be considered the same within the meaning of *the bond? Or might [*918 the plaintiff contend that, though the extension made the court and the office substantially different from what they were when the bond was entered into, the bond was still effective for the small parts remaining of the original jurisdiction? There is no precedent for such a division; and the case of Bonar *v.* McDonald is an authority directly against it. This cannot be admitted; for, where the duties and general liability of the bailiff are so much increased by the alteration and extension of the court, the risk of the surety and his liability to loss must be increased. The bailiff might be very competent in the opinion of the surety to execute the duties of the office of bailiff of the limited jurisdiction, but not if other important duties are added. It appears to me, therefore, that in this case the effect of the increased jurisdiction was so to alter the court and the office of bailiff as to affect the liability of the surety to his prejudice, and so to absolve the surety according to the principle of the decided cases.

ERLE, J.—I am of the same opinion, and have nothing to add.

Judgment for the defendant.

*The QUEEN *v.* The Guardians of the Poor of the Township of MANCHESTER. *Nov.* 8. [*919

Justices sent a pauper lunatic, residing in the township of M. in the county of L., to the county lunatic asylum of L., where he remained a patient for about three months, when he was discharged. About nine months after, justices made an order adjudicating the settlement of the pauper to be in S. in the union of H., in the county of Y., and ordering the union to pay the expenses of the conveyance to the asylum, and of the lodging, &c., there, under stat. 16 & 17 Vict. c. 97, s. 99.

On appeal against the order for payment, it was objected that such order was bad, inasmuch as by sect. 102 such expenses, in the case of a pauper lunatic who would at the time of the conveyance to the asylum have been exempt from removal to the parish of his settlement by reason of stat. 9 & 10 Vict. c. 66, are to be paid by the parish where the exemption has been acquired, and not by the parish of settlement; and that, under stat. 9 & 10 Vict. c. 66, s. 4, no warrant could be granted for removal of any person becoming chargeable in respect of relief made necessary by sickness, unless it was stated in the warrant that the justices granting it were satisfied that the sickness would produce permanent disability; and that it appeared in this case that the lunacy was not such a sickness.

Held, that sect. 4 of stat. 9 & 10 Vict. c. 66, was inapplicable, and the order for payment good.

Under sect. 107 of stat. 16 & 17 Vict. c. 97, three guardians of M. sent to the union of H. a copy of the order for payment, with the place of confinement, the grounds of adjudication, and the particulars of settlement relied upon. They signed their names to this, adding "guardians of the poor of the said township of M.:" but to one of the three names no other address was added.

Held: that the statement, if not good under sect. 107, was amendable under sect. 112.

On appeal against an order of two justices, whereby it was ordered that the guardians of the poor of the Halifax Union, in Yorkshire, should pay to the guardians of the poor of the township of Manchester, in Lancashire, certain sums incurred by the latter about the examination, conveyance, maintenance, &c., of Thomas Wood, a pauper lunatic, the Sessions set aside the order, subject to the opinion of this Court upon a case which was in substance as follows:

Thomas Wood, the said pauper lunatic, was, on 20th September, 1854, residing in and chargeable to the township of Manchester, and was on that day sent, under an order of justices, pursuant to the statute in that behalf, from the township of Manchester to the county *Lunatic Asylum at Prestwick in the same county, where he was then, in obedience to the said order, received into the said asylum; and in which asylum he remained a patient until 29th of December following, on which day he was discharged from the asylum, and before the time of the making of the order appealed against. On 6th September, 1855, the order appealed against was made.

*920]

The case set out the order, which was dated at Salford in Lancashire, 6th September, 1855, and was under the hands and seals of two justices of Lancashire. It recited that, by order of 20th September, 1854, Thomas Wood, a pauper lunatic, was, pursuant to the statute, sent, to wit, from the township of Manchester to an asylum, to wit, the county lunatic asylum situate at Prestwick in Lancashire, "and was then received into the said asylum, and had ever since been, and now is,(*a*) confined therein." And that the undersigned justices "have this day," to wit, 6th September, 1855, at Salford, &c., "duly inquired into the last legal settlement of the said Thomas Wood, so now(*a*) being confined in the said asylum as aforesaid; and satisfactory evidence has been obtained that the said settlement is in the parish, township, or place of Sowerby in the Halifax Union in the county of York;" and the justices found that Wood was a pauper lunatic, "and is now(*a*) confined in the said asylum;" and did, by that their order, adjudge that his last legal settlement was in the said parish, &c., of Sowerby. And that the guardians of the poor of the township of Manchester had paid and incurred the sum of 3*l.* 12*s.* 6*d.* for expenses in and about the examination of Wood, and the bringing him before a justice, and his conveyance to the said asylum; and had paid to the treasurer of the said *asylum the sum of 5*l.* 9*s.* 5*d.* for the reasonable charges (incurred within twelve months previous to the date and making of that order) for the lodging, maintenance, medicine, clothing, and care of Wood in the said asylum. And the justices did thereby order that the guardians of the Halifax Union should forthwith pay to the guardians of the poor of the township of Manchester the said sum of 3*l.* 12*s.* 6*d.*, and the said further sum of 5*l.* 9*s.* 5*d.*

*921]

(*a*) Sic.

A copy of this order, together with a notice of the chargeability of the pauper, and a statement in writing purporting, in manner hereinafter set forth, to be under the hands of three of the guardians of the Manchester Union, was, within a reasonable time after such order was made, sent by the guardians of the poor of the Manchester Union to the guardians of the poor of the Halifax Union.

The case set out a copy of the said notice, and of the last-mentioned statement. The material parts were as follows.

"To the guardians of the poor of the Halifax Union in the county of York.

"Take notice that Thomas Wood, the person named in the order first hereinafter mentioned, previously to the making of the same, had become and was then an inhabitant of, and resident in, the township of Manchester; and that he was then, and continued to be from that time to the 29th of December last, actually chargeable to the township of Manchester." The notice then recited the order of 20th September, 1854, and that Wood was, "to wit, on or about the 20th day of September, 1854, in pursuance" of the order, conveyed to the county lunatic asylum at Prestwick, "and was then received into the said asylum, and was, from that time to the 29th day of December last, confined therein." *The case then recited the order of 6th September, 1855, a copy of which was sent. "And, further, take notice that the following is a statement setting forth the grounds upon which the said last-mentioned order has been obtained and made, including the particulars of the settlement or settlements relied upon in support thereof, namely: [*922

"That the said Thomas Wood was and had been, for some time previously to the 20th day of September, 1854, an inhabitant of and resident in the township of Manchester, in the county of Lancaster; and that he was then, and continued to be, actually chargeable thereto, until the 29th day of December last.

"That the said Thomas Wood was, on the 20th day of September, 1854, a pauper lunatic.

"That the said Thomas Wood was, on or about the 20th day of September, 1854, sent from the township of Manchester, in the county of Lancaster, to the county lunatic asylum at Prestwick, in the county of Lancaster,,and was then received into the said asylum, and was confined therein until the 29th day of December last."

That the guardians of the township of Manchester had incurred and paid the expenses in question.

"That the said parish, township, or place of Sowerby is a parish, town, and place situate within, and forms part of, the Halifax Union in the said county of York."

The notice then set forth the particulars of a derivative settlement of the pauper in Sowerby.

"Dated the 4th day of October, A. D. 1855.

"C. H. RICKARDS, Chairman, New Brown Street, Manchester, paper dealer, WILLIAM HORSFALL, FRANCIS PARNELL, Spring Gardens, Manchester, manufacturer. } Guardians of the Poor of the said Township of Manchester."

*923] *Against this order the overseers of the township of Sowerby gave notice, and served grounds of appeal.

The 2d, 4th, 5th, and 6th of such grounds are alone material, and are as follows:

"2d. That no statement under the hands of the guardians of the poor of the township of Manchester, or of any three or more of such guardians, setting forth the grounds of adjudication, or the particulars of the settlement relied on in support of the said order, had been sent or delivered as required by the statute in that behalf; and that, if any such statement has been so sent or delivered, such statement is defective and bad in not stating the address of each of the several guardians by whom the same purports to be signed."

"4thly. That no legal order was ever made for the removal of the said Thomas Wood, as a lunatic pauper, from the said township of Manchester to the county lunatic asylum at Prestwick, in the said county of Lancaster: and his removal to that asylum, and the payment of all expenses in relation thereto, and of the costs of the maintenance of the said Thomas Wood in the said asylum, were illegal."

"5thly. That the said order of 6th September last, against which we now appeal, is bad; inasmuch as, at the time of the making of such order, and also at the time of the said Thomas Wood being conveyed to the said asylum, he was irremovable by reason of the provisions contained in the Act," &c. (9 & 10 Vict. c. 66).

"6thly. That the said order against which we now appeal is bad; inasmuch as, at the time of the making thereof, and also at the time of the said Thomas Wood being conveyed to the said asylum, he was chargeable to the said township of Manchester in respect of relief

*924] made *necessary by sickness which would not cause permanent disability in the said Thomas Wood."

After the service of the grounds of appeal, on 21st December, 1855, the attorney of respondents sent by post a letter to the attorneys of the appellants, informing them that the description and address of the said William Horsfall were as follows: "Calenderer and maker-up, Garden Street, Shade Hill, Manchester."

On the trial of the appeal it was admitted, by the appellants, that the pauper was, at the time he became chargeable and thence to the time of the appeal, settled within the appellant's township; and, by the respondents, that the lunacy, on account of which the pauper had been sent to the asylum, as mentioned in the said order, had ultimately

proved to be temporary only, and had not in fact produced permanent disability.

Two objections were insisted on by the counsel for the appellants, as grounds for setting aside the order, namely:

1st. That the said pauper had become chargeable, and had been conveyed to the said asylum, by reason of his being a lunatic, whose lunacy was not of a permanent nature, and had produced temporary disability only at the date of the order appealed against, and was such a sickness whereby no warrant for his removal could be granted within the meaning of stat. 9 & 10 Vict. c. 66, s. 4; and that no order upon the parish of the settlement of the said lunatic pauper could be made in respect of the expenses in and about the examination, removal to, and maintenance of the said lunatic pauper in, the said asylum.

2d. That the said statement in writing, setting forth the grounds of adjudication and particulars of settlement *sent by the guardians of the Manchester Union to the said guardians of the said Halifax Union was defective and insufficient, inasmuch as it did not state the address of the said William Horsfall, one of the guardians by whom the said statement was signed. [*925

The counsel for the respondents applied to the Court of Quarter Sessions to amend the said statement by adding, after the signature of the said William Horsfall, the description and address of the said William Horsfall as given in the said letter sent by the attorney of respondents to the attorney of appellants. The Court of Quarter Sessions refused the application on the ground that it had no power to make such amendment: and, after hearing counsel for the respondents on the two objections taken by the appellants, held that both the said objections were valid, and discharged the said order, subject to the opinion of the Court of Queen's Bench.

The questions for the opinion of the said Court of Queen's Bench are:

1st. Whether the said first-mentioned objection of the appellants is good and well founded.

2d. Whether the said 2d objection is good and well founded: and, if the opinion of the Court on this question be in the affirmative,

3d. Whether the said Court of Quarter Sessions had power to make the amendment prayed.

If the Court of Queen's Bench shall be of opinion that the first objection is well founded, then the order of Sessions is to be confirmed, and the order appealed against is to be discharged. If the Court of Queen's Bench shall be of opinion that the first objection is not well founded, but that the second objection is well founded, and that the Quarter Sessions had not power *to make the said amendment prayed, then the order of Sessions is to be confirmed, and the order appealed against is to be discharged. But, if the Court shall be [*926

of opinion that neither objection is well founded, or that the second objection only is well founded and that the Court had power to make the said amendment prayed, then the order of Sessions is to be discharged, and the order appealed against is to be confirmed.

Pashley and *Maule*, in support of the order of Sessions.—First: the Halifax union was not liable to these expenses. By stat. 16 & 17 Vict. c. 97, s. 102, when a pauper lunatic who has been conveyed to an asylum would have been exempt from removal by virtue of any provision of stat. 9 & 10 Vict. c. 66, if he had not been a lunatic, the expenses are to be paid by the parish, &c., in which he would have acquired such exemption. [*Monk*, contrà, pointed out that the words "if not a lunatic," which were in stat. 12 & 13 Vict. c. 103, s. 5, did not occur in the analogous section (102d) of stat. 16 & 17 Vict. c. 97, which repealed sect. 5 of stat. 12 & 13 Vict. c. 103.] It is obvious that the case contemplated is the same in each enactment. The course of legislation seems to have been this. By stat. 8 & 9 Vict. c. 126, s. 62, on the settlement of the lunatic who has been sent to an asylum being ascertained, the justices are to make an order for payment, to the parish from which he is removed and the officers of the asylum, by the officers of the union or parish of settlement, of the costs of removal and the expenses incurred within twelve months. Stat. 9 & 10 Vict. c. 66, s. 1, introduces a limitation to this, by making the removal of a pauper lunatic to an asylum no removal under that Act. Stat. 12 & 13 Vict.
*927] *c. 103, s. 5, further exempts the parish of settlement from the expenses of the removal of a pauper lunatic to an asylum who, if not lunatic, would have been irremovable by stat. 9 & 10 Vict. c. 66, and throws the expenses on the union comprehending the parish in which the pauper lunatic was resident. And, this enactment, comprehending only parishes in a union, stat. 15 & 16 Vict. c. 97, s. 102, extended it to parishes not in an union. The question therefore is whether, under stat. 9 & 10 Vict. c. 66, the pauper, if not lunatic, could have been removed from Manchester. Now he was chargeable only by reason of his lunacy. But, by sect. 4, "no warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant shall state in such warrant that they are satisfied that the sickness or accident will produce permanent disability." Lunacy cannot be called sickness; nor, in the present case, was it permanent; for the pauper was discharged from the asylum in a few months, long before the order for payment was made on the Halifax union. [Lord CAMPBELL, C. J.—That seems unimportant: the material date is that of the removal to the asylum. How were the justices, at that time, to know whether the lunacy would be permanent or not? COLERIDGE, J.—It is difficult to see how sect. 4 is applicable to the case of a lunatic at all. Besides, it relates only to what is to appear on the face of the

order of removal in case of sickness.] To say that no warrant shall be made for removing a pauper is to say that he shall not be removed at all. [Lord CAMPBELL, C. J.—The enactment in stat. 16 & 17 Vict. c. 97, s. 102, appears to me to refer to the three cases in which the status of *irremovability is created under stat. 9 & 10 Vict. c. 66, [*928 namely, five years' residence (sect. 1), the residence of a wife with a husband at the time of his death (sect. 2), and the residence of a child with its father or mother (sect. 3). COLERIDGE, J.—As to sect. 4, I do not see what there is in this case to show that the removing justices might not have stated in the order of removal that the sickness would be permanent. Lord CAMPBELL, C. J.—If they thought so at the time, can it be contended that this would not have been enough? I do not see, moreover, that there was any "relief" given to the pauper before he was in the asylum.] All expenses incurred for his protection would be relief conferred.

As to the second point: the notice was insufficient. By stat. 16 & 17 Vict. c. 97, s. 107: "The overseers of any parish, and the guardians of any union or parish, and the clerk of the peace of any county, obtaining any order under this Act adjudging the settlement of any lunatic to be in any parish, shall; within a reasonable time after such order has been made, send or deliver, by post or otherwise, to the overseers or guardians of the parish in which such lunatic is adjudged to be settled, a copy or duplicate of such order, and also a statement in writing under their or his hands or hand, or where they are the guardians of a union or parish under the hands of any three or more of such guardians, stating the description and address of the overseers, guardians, or clerk of the peace obtaining such order, and the place of confinement of the lunatic, and setting forth the grounds of such adjudication, including the particulars of any settlement or settlements relied upon in support thereof; and on the hearing of any appeal against any such order it shall not be lawful for the respondents to *go into or give evidence of any other grounds in support of [*929 such order than those set forth in such statement." Here the document does not contain the address of William Horsfall, one of the guardians who sent it. By sect. 110, no appeal against the order can be allowed unless notice in writing be given to the party obtaining the order. That cannot be done unless the address of such party be given. [*Monk*, contrà.—The respondents contend that it is enough to give the official description and address, as here, "Guardians of the poor of the said township of Manchester," and that the personal address of each guardian is not required. Under the previous sections, the parties who may obtain the order are various, according to circumstances; the order may be obtained by the treasurer of a county, by guardians or overseers, or by a clerk of the peace: the object of sect. 107 is to show the character of the party obtaining it.] The order alone would show that,

inasmuch as it should state on whose complaint it is made. [COLERIDGE, J.—It does not always do so: it does not do so here.] The fact must at any rate always be known. But it is said that the Sessions, under sect. 112, had power to amend the defect. Now that section gives power only to amend the "statement;" but the description and address of the guardians is no part of the statement. The "statement" is the setting forth of the grounds of adjudication and the particulars of settlement; sect. 107. [COLERIDGE, J.—That is not all: in sect. 107 there are two participles agreeing with "statement": "stating the description and address," &c., and "setting forth the grounds," &c.] It should rather seem that the "statement" is complete without the signature: the parties sign, in order to show who it is that makes the statement.

*930] **Monk* and *A. Milne*, contrà, were not called on.

Lord CAMPBELL, C. J.—This case has been very well argued; and I must add that we have had particular pleasure in hearing Mr. *Maule*. But we are all of opinion that neither objection can prevail; and, as to the last point, the Sessions had at any rate a power of amendment. The order of Sessions must be quashed.

COLERIDGE, WIGHTMAN, and ERLE, Js., concurred.

Order of Sessions quashed.

JOHN BENNET LAWES *v.* EDWARD PURSER, JOHN DAVID POOLE, and JOHN WAITHMAN. *Nov.* 10.

Action for a sum agreed to be paid to the plaintiff for each ton of an article manufactured and sold by the defendants by the permission of the plaintiff to them given at their request, the plaintiff having letters patent for the sole manufacture and sale of that article.

Plea: that the letters patent were void, and the defendants had a right to make and sell the article without plaintiff's permission. On demurrer:

Held, a bad plea; for, the invention having actually been used by the permission of the plaintiff, and there being no allegation of fraud, or of anything equivalent to eviction, the defendants were not at liberty to set up as a defence that the patent was void.

ACTION "for money payable by defendants to plaintiff for a payment of 10*s*. per ton due to plaintiff by agreement between plaintiff and defendants, to wit, a payment of 10*s*. per ton upon and in respect of divers tons of a substance used in certain manure, manufactured or sold by defendants within the limits mentioned in the letters patent hereinafter mentioned, pursuant to plaintiff's permission or authority for that purpose previously given by plaintiff, being such patentee as hereinafter mentioned, to defendants at their request, such manure having been

*931] manufactured by means of *the use of an invention" for which plaintiff held letters patent. Plea: that, at the time of the agreement and at all times afterwards, the "letters patent were void and of no effect, and plaintiff had no such right or privilege as supposed;

and defendants were already, before and at the time of making the supposed agreement, and at all times thereafter, entitled as of right and without license or permission from plaintiff to use the supposed invention and manufacture, and sell the said manure in the manner alleged; and plaintiff never did give or grant to defendants any license; and the same, if given or granted, would have been wholly void and superfluous; and defendant had no benefit from the said agreement; and there was not at any time any sufficient consideration for the making by defendants of the supposed agreement, or paying any of the money now claimed; and the agreement was at all times void." Demurrer. Joinder.

Butt, for the plaintiff.—On this record it appears that the consideration has actually been executed, and the defendants have enjoyed the benefit of the plaintiff's permission to use the patent right; and, having done so, they are estopped from denying the plaintiff's title. Their situation is analogous to that of a person who has actually occupied land by permission of another; such occupier must pay the rent to the party who let him in, though the title to the land may be in a third person. Hayne *v.* Maltby, 3 T. R. 438, will probably be relied on by the other side: but there the Court proceed partly on the ground that the contract was executory, and partly on the ground of *fraud. [*932
Neither ground exists here; the plea would no doubt be good if it averred fraudulent knowledge that the patent was void, or if it showed the whole to be merely executory, as in Chanter *v.* Leese, 4 M. & W. 295.† [COLERIDGE, J.—Is it clear that the consideration here is executed? The defendants bargained for a preferential right over others; and if they did not get that they may say they did not enjoy the consideration.* Suppose the owner of the soil of the public street were to sell licenses to pass along it, would you say the licensee was estopped from showing it was a public thoroughfare which all may use?] Perhaps, if all men used it publicly, that might be equivalent to an eviction. At all events, on discovering that there was such public user, the licensee might give notice that he renounced the license; and then in future the parties could be remitted to their rights: but whilst the defendants continued to use this invention under the permission of the plaintiff no action for the infringement could be brought against them, as the permission would be a good defence to that action; so that, even if the patent were openly infringed by others, the plaintiff has lost the opportunity of trying the validity between him and the defendants in the ordinary way. On this record, however, that question does not arise: the plea would be proved if the patent was supposed by everybody to be good up to the hour before the plea pleaded, when the ingenuity of the pleader detected some technical defect. Bowman *v.* Taylor, 2 A. & E. 278 (E. C. L. R. vol. 31),(*a*) is in favour of the plaintiff. [WIGHT-

(*a*) See per Erle, J., in Stroughill *v.* Buck, 14 Q. B. 785 (E. C. L. R. vol. 68).

MAN, J.—That decision turned entirely on the estoppel by the deed.] Cutler *v.* Bower, 11 Q. B. 973 (E. C. L. R. vol. 63), did *not proceed on that ground. If the defendant can refuse to pay on the ground of failure of consideration, he could also on the same ground recover back any money actually paid: but he cannot do so; Taylor v. Hare, 1 New Rep. 260. The plea here admits the user in fact by the permission of the plaintiff, although it denies that there was a license under seal: but that is immaterial: Chanter *v.* Dewhurst, 12 M. & W. 823.† *933]

Aspland, contrà.—There is a distinction between land or something corporeal, which may be enjoyed without any right, and the grant of an incorporeal right, in which, unless the right pass, nothing is conveyed. This was pointed out by Lord Denman, C. J., in Bowman *v.* Taylor, 2 A. & E. 278, 287 (E. C. L. R. vol. 29). The estoppel on a deed does not arise here. The plaintiff, if he had not a right to the patent, has only bound himself not to make unfounded complaints. That is no consideration; White *v.* Bluett, 23 L. J. Exch. 36.

Butt was not called upon to reply.

Lord CAMPBELL, C. J.—The declaration in this case is clearly sufficient: it shows a contract executed, from the execution of which the defendant has derived benefit. What then is the plea? Simply that the patent was void; and, if it could be shown that the patent was, for any reason whatever, invalid, the plea and every allegation in it would be proved. Then, there having been such an agreement as stated in the declaration, and permission to use the invention having been enjoyed under it, can it be permitted to the *defendants, after such a contract and such acquiescence on their part in the plaintiff's claim, and such enjoyment by them of the invention, to say that they will not pay the stipulated price, because the patent is void, and so to force the plaintiff to try his right to the patent in this action at great disadvantage. I am of opinion that the defendants, not denying that they have used the invention under the agreement, cannot set up this defence. This plea would be proved though the plaintiff had really made a useful invention, and had taken out a patent for it, treated by every one as valid and supposed by all parties to be so, if at the time of the trial it were discovered, for the first time, that there had been some previous user of the invention or some part of it, though utterly unknown both to the plaintiff and defendants. It would be monstrous if the defendants after such an agreement acted upon could, on this ground, refuse payment. No fraud is alleged. No renunciation of the permission, warning the plaintiff that the defendants meant to claim to use the invention in their own right, is averred. I think therefore it would be contrary to all principle to hold this plea good. *934]

COLERIDGE, J.—There is no doubt, in my mind, as to the principle that he who has, in fact, enjoyed a consideration by permission of

another must pay for it. At one time I did doubt whether it did appear in this case that the consideration had been enjoyed. I am now satisfied that it does; and, if so, the plea is bad.

WIGHTMAN, J.—It is clear that the agreement has been acted upon; and the defence is that, the patent *being invalid, there is, as it is said, no consideration; but it seems to me that the defendants had, in fact, all they bargained for. It was suggested that the case was like that of a man professing to grant a right of way over a spot where all the public use the right already, so as to put those who have accepted the grant in a worse position than others. But it does not, in this case, appear that the defendants have lost any opportunity of questioning the patent. It may very well be that the discovery that the patent was invalid was only made at the time of the plea pleaded; and it is clear to me that enjoyment by permission of the patentee, whilst the patent was supposed to be valid, is consideration. The point is very nearly the same as that in Taylor *v.* Hare, 1 New Rep. 260. There the plaintiff sued to recover back the money paid by him, on the ground that the consideration had failed. Mansfield, C. J., says: "In this case two persons equally innocent make a bargain about the use of a patent, the defendant supposing himself to be in possession of a valuable patent-right, and the plaintiff supposing the same thing. Under these circumstances the latter agrees to pay the former for the use of the invention, and he has the use of it; non constat what advantage he made of it; for anything that appears he may have made considerable profit. These persons may be considered, in some measure, as partners in the benefit of this invention. In consideration of a certain sum of money the defendant permits the plaintiff to make use of this invention, which he would never have thought of using had not the privilege been transferred to him." And Chambre, J., puts it on the same ground; *he says: "The plaintiff has had the enjoyment of what he stipulated for;" and so have the defendants here. [*935 [*936

ERLE, J.—It is my opinion that the defendants are bound by their promise, they having had the consideration they bargained for. The plaintiff was in possession of a patent-right; the defendants promised to pay him for permission to use it; and they have had that permission. I am decidedly of opinion that, if the plaintiff had then known that the patent was void, this would prove fraud on his part; but that is not alleged. Then it is clear to me that, if the defendants go on under this agreement, using the patent-right by the plaintiff's permission, they must pay him, whether the patent was valid or not, until, at least, they give notice that they dispute the validity of the patent, and will, in future, use the invention in their own right, and not under the permission of the plaintiff. Such a notice would change the position of the parties: after it the patentee might sue the defendants for an infringement of his patent for any subsequent user; and perhaps in an

action on the agreement for the price for such subsequent user the invalidity of the patent might be a defence. But there is no such notice here; and for the user till there is such notice the defendants must pay. Judgment for plaintiffs.

---

*ROBERT THOMPSON, JOSEPH LOWES THOMPSON, and JOHN THOMPSON v. THOMAS DUCK HOPPER.

Nov. 12.

Action on a time policy on a ship for a total loss. Plea: that the plaintiffs knowingly, wilfully, wrongfully, and improperly sent the ship to sea in a condition in which it was dangerous to go to sea, and suffered her to remain in that state near the shore, during which time, by reason of the premises, the loss occurred. Issue thereon. On the trial, it appeared that the plaintiff personally sent the ship out to sea in an unseaworthy state, and caused her to anchor in the offing in that state. Whilst there she was caught in a storm from seaward, and driven ashore. There was evidence justifying the jury in finding that the unseaworthiness had been made good before the loss, and that the immediate cause of the loss was not occasioned in any way by the unseaworthiness; and, the jury having found that such was the fact, a verdict was entered for the plaintiffs. There was evidence from which the jury might have drawn the conclusion that, though the unseaworthiness was not the immediate cause of the loss, the loss would not have occurred if the ship had been seaworthy when she went to sea. No question on this was left to the jury.

Held, that the plea was proved, if that misconduct of the plaintiff occasioned the loss, though it was not its immediate cause; and a new trial was granted on this ground.

*937]

THE declaration contained two counts on separate time policies on the ship Mary Graham. In each the loss was alleged to be by perils of the sea. Pleas to the first count. 1. That the ship was at the time of the policy lying in a British port, the residence of the plaintiffs, her owners, and was by them sent to sea in an unseaworthy state; and whilst in that state she was lost. 2. That the plaintiffs *knowingly* sent her to sea in an unseaworthy state; and that whilst in that state she was lost whilst in that condition. 3. That the plaintiffs knowingly, wilfully, wrongfully, and improperly sent the ship "out to sea in an unseaworthy state, and when she was not fitted for the voyage, and when she was not in a fit and proper condition safely to go to sea, and at a time when it was dangerous for the ship to go to sea in the state and condition in which she then was. And plaintiffs wrongfully and improperly caused and permitted the said ship to be and remain on the

*938]

*high seas near to the sea shore, for a great length of time, in the state and condition aforesaid, and without a master and without a proper crew to manage and navigate her on her said voyage; during which time the said ship, *by reason of the premises*, became and was wrecked and wholly lost." Pleas 4, 5, and 6 were pleas to the second count, corresponding respectively to pleas 1, 2, and 3 to the first count. There was a demurrer to all the pleas; and issues were also joined on them. Judgment was given in last Hilary Vacation on

the demurrer: for the plaintiffs on the first, second, fourth, and fifth pleas; and for the defendant on the third and sixth.(*a*)

On the trial of the issues in fact, before Bramwell, B., at the last Summer Assizes for Durham, it appeared that at Sunderland vessels take in coals in the dock from the staith. From the manner in which coals are put on board a ship there, it is necessary to cast loose the standing rigging on the side next the staith, so as to be able to remove it out of the way of the crane. This deprives the masts of the vessel of the support which they would otherwise derive from the rigging; and it is impossible to set sail upon such a vessel till the rigging is again made fast: but of course, whilst the vessel is in dock, it is not important that she should be able to set sail. Vessels going out of the Sunderland Dock pass over a bar into an open roadstead, exposed to the east. It is not unusual for vessels going to sea to be taken across that bar at high water, though not quite ready for sea, so as to save the tide, and to wait in the roadstead to complete their equipment. Should the wind blow hard from the east whilst they are in this roadstead, they would be embayed on a lee shore, and consequently in a situation of great danger; but if on the commencement of the gale [*939 the vessel sets sail, and gets out to sea, that danger is escaped. The Mary Graham, the subject of the present policies, had been chartered to take a cargo of coals from Sunderland to Constantinople. She was in Sunderland Dock loading her cargo; and the standing rigging on her larboard side, which was that next the staith, was cast loose in the usual manner. On the 22d of November, 1854, her loading was completed. There were apprehensions that if she did not get to sea that tide she would be neaped and obliged to wait in dock till the next spring tides: for that reason she was taken out that tide at high water, about 4.30, P. M., without waiting to make fast the standing rigging. Two of the plaintiffs who were resident at Sunderland came down to the dock and saw her go out; one of them was on board her at the time she was towed over the bar. She was taken out in the roadstead and anchored with a good offing, with a single anchor, in 14 fathoms of water, with about 45 fathoms of chain cable out. At this time the larboard standing rigging was still loose; several lumpers were left on board making it fast, an operation which might be completed in a few hours; and the plaintiff who was on board then left the vessel. The captain came on shore in a boat, leaving a pilot on board, who was a person of competent skill. One point made at the trial was that the subsequent loss was owing to the absence of the captain; but ultimately nothing turned on this. At this time the wind was from the west; but there were symptoms from which it might have been known that an easterly gale was coming on; it did not, however, appear that either

(*a*) See Thompson *v.* Hopper, ante, p. 172, where the pleadings are set out at length.

*940] the *plaintiffs or any of the persons on board the vessel had observed them. It came on to blow very hard from the east; and about midnight the Mary Graham went ashore, and was dashed to pieces. The pilot, the whole of the crew, and all the lumpers but one, perished. This one man who was saved was called as a witness for the defendants at the trial. The facts occurring before the plaintiffs' boat left the vessel were scarcely in controversy at the trial; what happened afterwards could only be known from the testimony of this surviving witness, and the circumstantial evidence derived from the appearance of the wreck. It appeared by the account given by the witness that the crew had endeavoured to weigh the anchor, but were unable to do so, owing to the heavy sea and the pitching of the vessel. They then endeavoured to let the cable slip; but the chain cable had got entangled, or, as it is technically called, had *kinks* in it, and could not be let slip. The witness, who had himself assisted in the vain attempt to get the chain disentangled, gave his evidence that the chain from its condition must have been so entangled as to be unfit for use before the vessel left the dock; but there was evidence that it had been overhauled and was then in good order. One of the plaintiffs, having been personally on board the vessel when she sailed, had the opportunity of seeing the chain; but it was not shown that, supposing the ship was unseaworthy on this account, the plaintiffs or either of them had observed it. When the attempt to slip the cable failed, the carpenter endeavoured to knock out the pin which held together the links: he was unable to do so; whilst attempting it, he was repeatedly washed away. The witness gave

*941] his evidence that the pin must have been rusted, as if it *had been clean the carpenter could have knocked it out: but the chain itself came ashore with the wreck; and the pin in question was produced in court. It was of galvanized iron, not capable of rusting, and not rusted; it was slightly bent from the blows, but could still be knocked out; and it was argued for the plaintiffs that the failure of the carpenter was not attributable to the bad state of the chain, but to the breaking sea, which knocked him away. The crew then attempted to cut the chain with a cold chisel, of which the chain when driven ashore bore marks, but without success. At last the chain broke close to the anchor: the vessel, having 45 fathoms of chain cable dragging upon her bow, was unmanageable, and was driven on the rocks. The witness gave his evidence that the standing rigging had not been made fast at the time the cable broke; but it was clear that the crew had previously endeavoured to cut the cable; and it was argued that they would never have done so if they knew that the vessel was not in a state to set sail. There were other facts: but it is sufficient for the purpose of explaining the case to state the above, which were the important facts.

The learned Judge summed up at considerable length, pointing out to the jury the bearing of the evidence. He asked the jury to answer,

as facts, six questions: 1st. Whether the plaintiffs sent the vessel to sea? 2d. Whether they sent her to sea at a time when she was not in a fit and proper condition to go to sea, and at a time when it was dangerous for a ship to go to sea in the state and condition in which she then was? 3d. Whether she was seaworthy when she left the harbour? 4th. Was she lost through unseaworthiness? 5th. Did *the plaintiffs know the facts which made her unseaworthy and caused her loss? 6th. Did they know that these facts did make her unseaworthy? The jury answered: 1st. That the plaintiffs themselves sent the vessel to sea. 2d. That on leaving the dock she was not in a fit and proper condition to go to sea in the state and condition in which she then was. 3d. That she was not seaworthy when she left the harbour. 4th. That she was not lost through unseaworthiness. And therefore they submitted that it became unnecessary to answer the two last questions. Some discussion then ensued in court, the result of which was, as reported by the learned Judge, "that the jury found, in effect, that the vessel was lost owing to the dragging of the cable, and the inability to cut or slip it, which inability was accidental and arising at the moment, and was not caused directly or indirectly by any unseaworthiness." [*942

The learned Judge directed the verdict to be entered for the plaintiff generally.

Hugh Hill, in this Term, obtained a rule Nisi for a new trial, on the ground of misdirection in this: "that the learned Judge called the attention of the jury to each particular cause of unseaworthiness, and directed them to find whether or not the loss was attributable to all or any of such causes, but did not leave it to them to find whether or not the moving cause of the loss was the sending the ship to sea in an unseaworthy state, which rendered it necessary to detain the ship in a dangerous position for a considerable time; and also on the ground that the verdict was against evidence."

Knowles, *Atherton*, and *Unthank* now showed cause; (*a*) and *Hugh Hill*, *Wilde*, and *Manisty* were heard in support of the rule. [*943

During the discussion it was agreed, by the defendant's counsel, that if the jury thought that the rigging had been made taut before the loss of the vessel, and that the breaking of the chain in the manner described was the immediate cause of the loss, and was an accident which might have befallen any ship riding at anchor in that spot, in that storm, their finding was not against evidence; and consequently that the rule for a new trial as against evidence could not be supported. But they contended that there was at least evidence that, had the vessel

(*a*) Before Lord Campbell, C. J., Coleridge, Wightman, and Erle, Js. The argument was not finished on this day, and was resumed and concluded on Thursday, November 13th, before the same Judges.

been seaworthy as to her rigging when sent out, she either would not have anchored where she did, or would have gone out to sea when the wind began to blow from the east, before the storm was high, and in either case would have been safe; and consequently that the plaintiffs' wrongful act in sending her out in that state, though not the proximate cause of the loss, was the moving cause of the loss. And the plaintiffs' counsel agreed that the jury were not asked whether this was so. The point therefore was reduced to this, Whether such a state of facts would prove the substance of the third and sixth pleas.

The arguments and authorities are so fully stated in the judgment as to render any further report unnecessary. *Cur. adv. vult.*

*944] *Lord CAMPBELL, C. J., on a later day in this Term (November 25), delivered judgment.

This was an action on a policy of insurance on the ship Mary Graham, from 21st October, 1854, to 1st March, 1855. The declaration alleged a loss by perils of the sea. The first plea alleged that at the time of the insurance the ship was lying in the port of Sunderland, bound for Constantinople: that she was loaded with a cargo of coals to be carried in that voyage: that the plaintiffs, after she was so loaded, sent her out to sea in an unseaworthy state; and that, while she was on the high seas in an unseaworthy state, she was wholly lost. A second plea added, that the plaintiffs so sent her to sea in an unseaworthy state, "knowingly, wilfully, wrongfully, and improperly." By a majority of the Court these two pleas were held to be bad, on the ground that, there being no implied warranty of seaworthiness in a time policy, this policy had attached, notwithstanding the alleged unseaworthiness; and that the pleas did not in any way impute the loss to the unseaworthiness or to the alleged improper conduct of the assured. But there was a third plea, which further alleged that the "plaintiffs wrongfully and improperly caused and permitted the said ship to be and remain on the high seas near to the sea shore, for a great length of time, in the state and condition aforesaid," "*during which time the said ship, by reason of the premises, became and was wrecked and wholly lost.*" This third plea the Court unanimously held to be sufficient. The plaintiffs having traversed it, as well as demurred to it, the issue was tried before my brother Bramwell at the last assizes for the county

*945] of Durham, when the verdict was found for the *plaintiffs. A rule, however, was granted to show cause why there should not be a new trial for misdirection in this, that the learned Judge called the attention of the jury to each particular cause of unseaworthiness, and directed them to find whether the loss was attributable to all or any of such causes, but did not leave it to them to find whether or not the moving cause of the loss was the sending of the ship to sea in an unseaworthy state, which rendered it necessary to detain the ship in a dangerous position for a considerable time.

This appears to be substantially a correct statement of the learned Judge's direction: and the question whether this direction was defective and exceptionable depends entirely upon the construction to be put upon the concluding allegation in the third plea. If this means only that the loss was caused directly and proximately by the unseaworthiness of the ship, the questions left to the jury embrace all that was material for their consideration, and the findings of the jury (which are sufficiently supported by the evidence) entitle the plaintiffs to retain their verdict. According to the report of the learned Judge, "the jury found, in effect, that the vessel was lost owing to the dragging of the cable, and the inability to cut or slip it, which inability was accidental and arising at the moment, and was not caused directly or indirectly by any unseaworthiness." The words "or indirectly" here introduced merely intimate the opinion of the jury that the proximate cause of the loss was not in any degree the whole or any part of the unseaworthiness which they did find to exist. Whether the loss was caused remotely or indirectly by the unseaworthiness of the ship, or by the improper conduct *of the assured, was never submitted to the jury. In holding upon the demurrer that the third plea was a good bar to [*946 the action, we did not proceed on the narrow ground that the unseaworthiness was the direct and proximate cause of the loss. We considered that the plea was framed upon the principle that a man shall not be allowed to avail himself of his own wrong. The plea charges wrongful acts on the part of the assured of which they were personally guilty, and avers that the loss was occasioned by these wrongful acts. The whole plea being traversed, the jury were to consider whether the wrongful acts charged were proved, and whether they occasioned the loss? The jury have found the allegations to be true that the plaintiffs, "knowingly, wilfully, wrongfully, and improperly sent the ship, so loaded, out to sea in an unseaworthy state, and when she was not fitted for the voyage, and when she was not in a fit and proper condition safely to go to sea, and at a time when it was dangerous for the ship to go to sea in the state and condition in which she then was," and "wrongfully and improperly caused and permitted the said ship to be and remain on the high seas near to the sea shore, in the state and condition aforesaid." By the authority of the plaintiffs (one of them being on board) the ship was sent from the dock and harbour of Sunderland into an open roadstead, when, from the state of the shrouds and other deficiencies, she was unfit to carry sail or to proceed on the voyage to Constantinople. She was in consequence brought up in the open roadstead, that her equipment might be completed: this was contrary to the usual course of navigation, and exposed the ship to extraordinary peril; an impending storm *overtook her while in the roadstead; and, by an acci- [*947 dent unconnected with the unseaworthiness, she was wrecked; but if she had been seaworthy when she left the harbour, and had

prosecuted her voyage without being brought up and remaining in the roadstead, there is strong reason for believing that she would have weathered the storm, and reached her port of destination in safety. The question which we have to determine is, whether the Judge was right in supposing the concluding allegation of the plea to be that the loss arose directly and proximately from the unseaworthiness.

We shall best discover what is the proper construction of the plea by considering what is the general law upon this subject as between assurers and assured. The plaintiffs' counsel rely upon the maxim "In jure non remota causa sed proxima spectatur;' thus paraphrased by Lord Bacon:(*a*) "It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree." They argue that the right construction was put upon the language of the plea by the learned Judge, because, unless the unseaworthiness was the proximate cause of the loss, it can afford no defence to the underwriters.

The legal maxim relied upon is very much to be respected; and it has been very properly applied to various points of insurance law, when consideration is had of particular perils for which assurers undertake to be liable, and particular perils from which they are exempted, and where questions have arisen whether the loss is proved to have occurred

*948] in the manner alleged *in the declaration, as in the cases of Livie *v.* Janson, 12 East, 648, Bush *v.* The Royal Exchange Assurance Company, 2 B. & Ald. 73, Walker *v.* Maitland, 5 B. & Ald. 171 (E. C. L. R. vol. 7), Bishop *v.* Pentland, 7 B. & C. 219 (E. C. L. R. vol. 14), Dixon *v.* Sadler, 5 M. & W. 405,† in Exch.,(*b*) Redman *v.* Wilson, 14 M. & W. 476,† and Heyman *v.* Parish, 2 Campb. 149. But even here the maxim is not to be applied if it would contravene the principles of insurance law and the manifest intention of the parties. Thus, where a vessel laden with hides and tobacco had, in the course of the voyage, shipped large quantities of sea water, and at the termination of the voyage it was discovered that the sea water had rendered the hides putrid, and that the putrefaction of the hides had imparted an ill flavour to the tobacco, and had thereby injured it, it was held that the damage thus occasioned to the tobacco was a loss by perils of the sea; Montayo *v.* London Assurance Company, 6 Exch. 451.† There the cause of the direct cause of the damage was regarded. So where, upon an insurance against loss by fire, the loss resulted from fire occasioned by the barratrous act of the master and crew, it was held that the loss by fire so caused was not within the policy; Waters *v.* The Merchants' Louisville Insurance Company, 11 Peters' Rep. (U. S.) 213, 219, Broom's Maxims, page 169 (2d ed.).

(*a*) Bacon's Law Tracts, p. 35 (ed. 1737).
(*b*) Affirmed in Exch. Ch.; Sadler *v.* Dixon, 8 M. & W. 895.

The maxim "in jure non remota causa sed proxima spectatur" is qualified by another legal maxim, "dolus circuitû non purgatur;" and *dolus* means any wrongful act tending to the damage of another. This is well illustrated by the case of Davis *v.* Garrett, 6 Bing. 716 (E. C. L. R. vol. 19). Action *for not safely carrying lime for the plaintiff in the defendant's barge in a certain voyage, the declaration alleging that the barge deviated from the usual and proper course of the voyage, and that, by means thereof, she was assailed by a storm and wrecked, whereby the lime was lost. In fact, the master of the barge did unnecessarily and wrongfully deviate from the usual and proper course of the voyage; during the deviation a tempest wetted the lime; and, the barge taking fire, the whole was lost. The defence was that the loss did not arise directly and proximately from the deviation. But, said Tindal, C. J., "it is obvious that the legal consequences must be the same whether the loss was immediately, by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event." "We think" "that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done." So there was judgment for the plaintiff. We are of opinion that the maxim relied upon can never be applied where it contravenes the fundamental rule of insurance law that the assurers are not liable for a loss occasioned by the wrongful act of the assured. This rule is laid down in every code and treatise upon the subject. Of these we were very copiously reminded during the argument; and they need *not now be more particularly referred to.(*a*) Is it to be said then that, to exempt the assurers from liability, the misconduct of the assured must be the direct and proximate cause of the loss? We think that, for this purpose, the misconduct need not be the causa causans, but that the assured cannot recover if their misconduct was causa sine quâ non. In that case they have brought the misfortune upon themselves by their own misconduct, and they ought not to be indemnified. The very object of insurance is to indemnify against fortuitous losses which may occur to men who conduct themselves with honesty and with ordinary prudence. If the misconduct is the *efficient cause* of the loss, the assurers are not liable. For this doctrine it will be enough to cite the leading case of Bell *v.*

[*949

[*950

(*a*) The foreign authorities referred to on this point were: Valin Sur l'Ordonnance de la Marine, liv. 3, tit. 6, Des Assurances, art. 27; 1 Emérigon, by Boulay-Paty, p. 364, chap. 12, s. 2; Code de Commerce, liv. 2, tit. 10, s. 2, see art. 351; 1 Phillips on Insurance (3d edit.) p. 494, sect. 911.

Carstairs, 14 East, 374. There the declaration on a policy of insurance, on an American ship, alleged a loss by *capture;* and it was proved that, during the voyage insured, the ship was captured by a French privateer, carried into a French port, and condemned as a prize. But it further appeared that she had not been properly documented according to existing treaties between the United States of America and France; and this was stated in the French Court of Admiralty to be the ground of the condemnation. The Court there adopted the argument of the counsel for the defendant, that it is the duty of the assured to do all that lies on them to secure the thing insured; that the underwriters
*951] *only insure against fortuitous losses against which the assured cannot provide; and that, although capture was the proximate cause of the loss, it had been occasioned by the default of the assured in not providing the ship with proper documents required by the treaties between the state to which she belonged and other countries. Lord Ellenborough says: "This is unquestionably such an adjudication of the capture of the property assured as prize, as *primâ facie* entitles the plaintiff to recover as for a loss by capture within the terms of his policy. But as the sentence is in our opinion equally to be regarded, as evidence of the facts inducing the condemnation, and upon which the condemnation proceeds, as of the judicial act of condemnation itself, it is material to look at the alleged ground of condemnation, in order to see whether it has been occasioned by any act or neglect on the part of the assured; for if it has been so occasioned, it would not be a loss against which the assured would, upon any principle of reason or justice as applied to this species of contract, be required to indemnify him: the indemnity stipulated on his part being only against the perils described in the policy, as far as they operate upon the property insured adversely, and not through the medium of any act or neglect *on the part of the assured himself*, producing the loss of the property insured." He concludes by saying: "We are of opinion that the plaintiffs, the assured, cannot claim from the underwriter an indemnity *for a loss thus occasioned by themselves.*"

The question therefore seems to be, not whether the wrongful act or neglect of the assured was the proximate cause or *causa causans* of the
*952] loss, but whether it was a *cause without which the loss would not have happened; whether the loss was fortuitous, or whether it was induced or occasioned by, or proceeded from, the wrongful act or neglect of the assured. This will not lead to the consideration of an indefinite series of causes supposed to act upon each other. Unless the proximate cause of the loss is put in motion by the wrongful act or neglect of the assured, so that the jury can clearly see that, without this act or neglect, the loss would not have happened, they cannot say the assured induced or occasioned the loss, and the underwriter would be held liable, the proximate cause being a peril for which by the policy

he is liable. At what conclusion the jury may arrive in this case it is not for us to say; but there surely is evidence from which, if the question had been left to them, they might have concluded that the wrongful act and neglect of the assured led to the loss, although not the proximate cause of it. The fact is admitted that the ship was unseaworthy when she sailed: and there were witnesses who swore that it was very dangerous to send her into the open roadstead in that condition; that when brought up she was exposed to a peril which she would have escaped had she been able to carry sail and to pursue her voyage; and that if she had done so, the accident from the dragging of the cable never would have occurred.

We are therefore of opinion that the direction of the learned Judge was defective; that the rule for a new trial should be made absolute; and that it should be put to the jury, not only whether the loss was attributable to all or any of the alleged causes of unseaworthiness, but whether the loss was in their opinion occasioned by any wrongful act or default *alleged in the plea of which they shall believe upon the evidence that the assured were guilty. [*953

Rule absolute for a new trial.

I may add that, although no point was reserved at the trial in this case, and although the Court is not divided, we will most willingly give leave to appeal if the plaintiffs would wish to take the opinion of a Court of error upon the question before going down to a new trial.

IN THE EXCHEQUER CHAMBER.

THOMAS REID and GEORGE REID, Appellants, *v.* EDWARD HAMILTON HOSKINS, Respondent. *Nov.* 12.

GEORGE AVERY, Appellant, *v.* SAMUEL WILSON BOWDEN, Respondent.

Declaration stated that plaintiff and defendant agreed, by charter-party, that plaintiffs' ship should proceed to Odessa, and there load from defendant's agent a cargo of specified goods, and therewith proceed home, a specified number of running days to be allowed for loading and unloading, and ten days for demurrage after the laying days: that the ship proceeded to Odessa; that the time for loading had elapsed; but defendant made default in loading.

Plea: that, after the vessel proceeded to Odessa, and before the alleged breach of contract, war was declared by the Queen against the Emperor of Russia, and war had ever since existed between this kingdom and Russia, of which plaintiff and defendant had notice before the alleged breach: that Odessa was part of the empire of Russia; and plaintiff and defendant were subjects of this kingdom, and not of Russia: that the ship was a registered British ship; and no license from the Queen could be obtained for loading the ship at Odessa: that defendant could not have procured a cargo or loaded the ship as agreed, nor could plaintiff have received such cargo, without trading or corresponding with the enemy. Issue on this plea.

It was proved that the master was directed, by defendant, to apply to defendant's agent M. at Odessa. War between England and Russia was first known at Odessa on 1st April, 1854, which was before the expiration of the running days. M., before 1st April, repeatedly told

the master that he should be unable to procure a cargo, owing to a Russian prohibition; and he also endeavoured to persuade the master to quit Odessa without a cargo, upon certain terms inconsistent with the charter-party. The master continued to demand a cargo till after 1st April, and, on a later day, but before the expiration of the running and demurrage days, left Odessa in ballast.

On appeal from the Court of Queen's Bench, held by the Court of Exchequer Chamber, affirming the judgment of Q. B., that the plea was proved.

By charter-party, defendant contracted with plaintiff to load at Odessa a cargo, on board a ship of plaintiff then to proceed from a British port: if, before the ship's arriving at Constantinople, "war had commenced," and was continuing on her arrival there, a cargo was to be loaded there at a reduced rate of freight. Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that, it appearing that both plaintiff and defendants were British subjects, this stipulation related to war between Russia, the State in possession of Odessa, and Great Britain, and not to war between Russia and Turkey, the State in possession of Constantinople. And therefore, war between Russia and Turkey having commenced before and continuing at the ship's arrival at Constantinople, but war between Russia and Great Britain not having commenced till afterwards, the alternative contract for loading at Constantinople did not take effect.

By charter-party, defendant agreed to load a cargo on plaintiff's ship at Odessa, certain running days to be allowed. To a count for not loading, which averred that, before the expiration of the running days, defendant dispensed with the ship remaining at Odessa, defendant pleaded that, before cause of action arose, war was declared between Russia and Great Britain, which rescinded the contract. It appeared that, after the ship had arrived, and before the declaration of war, defendant's agent had repeatedly told the master that he, the agent, had no cargo for the ship, and that the master had better go away: but the master continued to require a cargo till the declaration of war was known at Odessa, which was before the ship's laying days had expired. It further appeared that, in a conversation between plaintiff and defendant in England, after the declaration of war between England and Russia, defendant told plaintiff that he had determined not to load the ship, but to rely on the chapter of accidents, and that he had telegraphed to his agent at Odessa not to purchase a cargo.

Held, by the Court of Queen's Bench, that, assuming that the defendant's agent had on his part renounced the contract before the declaration of war, such renunciation, not being accepted by the master, constituted neither a dispensation nor cause of action.

On appeal to the Exchequer Chamber: the judgment was affirmed.

THESE were two appeals against decisions of the Court of Queen's Bench.

*954] *In Reid and another, appellants, against Hoskins, respondent, the appellants Thomas Reid and George Reid were plaintiffs below, and Edward Hamilton Hoskins was defendant below. The case stated for the opinion of the Court of Appeal disclosed the following circumstances.

This was an action for breach of a charter-party, dated 17th November, 1853, by which the plaintiffs' ship Themis was to proceed to Constantinople, and thence to Odessa or Kertch, Varna or Baltschik (as ordered at Constantinople), there to receive a cargo of tallow, grain, seed, or other stowage goods, at the option of the defendant, from the defendant, which he bound himself to ship. Forty-five running days were to be allowed the defendant, if the ship was not sooner despatched, for loading at the port of loading, and unloading at the port of

*955] *discharge, and ten days on demurrage: and, if one half or more of the cargo should consist of wool, ten additional days were to be allowed over and above the said laying days.

The declaration, after setting out the substance of the charter-party, averred that the ship proceeded. with all convenient speed, to Constan-

tinople, and thence to Odessa, pursuant to orders received at Constantinople: and that the plaintiffs did all things necessary on their part, and that all things necessary happened and were done, to entitle them to have a full and complete cargo of tallow, grain, seed, or other stowage goods, loaded on board the said ship at Odessa: yet the defendant made default in loading the said ship, and refused to load her as agreed.

The defendant pleaded three pleas. The issues joined on the 1st and 3d pleas were found for the plaintiffs; and nothing now turns upon them.

The second plea was as follows. That, before the alleged breach of contract, war was declared and proclaimed by Her Majesty, Queen Victoria, against the Emperor of Russia; and they then went to war; and that such war then commenced, and has ever since existed and raged; and this Kingdom and the Empire of Russia have, during the period aforesaid, been at open war with one another; of which the plaintiffs and defendant, before the alleged breach, had notice; and that Odessa during all the time aforesaid was part of the said Empire of Russia; and that the plaintiffs and defendant, during all the time aforesaid, were and are natural born subjects of this Kingdom, owing allegiance thereto, and not of the said Empire of Russia. That the said ship was, during all the time aforesaid, a British *ship, [*956 registered according to law in that behalf: and that no license from Her Majesty was or could be obtained or procured for loading any cargo on board the said vessel at Odessa aforesaid; and the defendant could not, without trading with the said enemy and his subjects, have procured a cargo or loaded the said ship as agreed; nor could the plaintiffs, without trading with the said enemy, have received such cargo.

The plaintiffs joined issue upon that plea.

The cause came on for trial before the Lord Chief Justice of the Court of Queen's Bench, at the London Sittings after Trinity Term, 1855: when it was proved that the ship arrived off Odessa on the 26th of February, 1854, but could not get into the mole (or harbour) till the 9th of March. That the ship got into the mole on the 9th of March, and was then ready to take in cargo. That the master went ashore on the 4th, 5th, and 6th days of March, 1854, and had an interview, on each of those days, with Mr. Matthieu the defendant's agent, to whom he was consigned, and who communicated with the master through an interpreter, he being unable to speak the English language himself.

That, at the first of these interviews (on the 4th of March), Matthieu informed the master, as the fact was, that on the 3d of March an Imperial Ukase had been published at Odessa forbidding the exportation of grain from that port; in consequence of which he, Matthieu, was unable to load the ship with a cargo of wheat which he had provided

for that purpose; and that he had no cargo for the ship. That, on the 5th of March, Matthieu asked the master if he would take half freight and cancel the charter-party, as he had no cargo to load; and he offered
*957] to give the master a letter to Constantinople to *enable him to make an arrangement with his, Matthieu's, brother who resided there; which proposal the master, after desiring time to consider of it, declined on the following day. That, on the 10th of March, the master gave Matthieu notice that the ship was ready (as from the 9th) to take in cargo. That, on the 20th of March, the master again saw Matthieu, who said he was going to send him (the master) a letter; and he asked the master if he would go away if the letter was sent him. The master said he could not tell till he saw the letter: whereupon a person called Hunt, who on that occasion acted (as he had done on former occasions) as interpreter for Matthieu, took a letter out of Matthieu's hands and read it to the master. The purport of the letter was, that it was of no use for the master to remain any longer at Odessa, as he, Matthieu, had no cargo for him, and the master was wanted to go to Constantinople, and arrange with Matthieu's brother. The master said he would not go; he would stick to the charter; and the letter was not sent on to him. That war was declared between England and Russia on the 28th of March, 1854; that the fact was known to several persons at Odessa on the 1st of April, 1854. That the master of the plaintiffs' ship did not know it till the 6th of April; and that it was officially announced at Odessa on the 7th of that month. That, on the 6th of April, the master had an interview with Matthieu, who asked him if he had any letter from his owner (meaning the plaintiffs): the master said he had not: the master asked Matthieu if he had received any letter from the defendant; Matthieu said he had; and thereupon his interpreter read a letter, stating that the defendant had taken the advice of one of the most able solicitors in London, who advised that the declaration of war
*958] had dissolved the *contract. It was further proved that the ship remained in the mole till the 22d of April, on which day Odessa was bombarded. That the master on that day took the ship out into the roads, to avoid the bombardment, and lay there till the 25th of April, on which day he set sail and proceeded to Constantinople in ballast, where he got no cargo: consequently he returned to England in ballast.

The foregoing evidence having been given, the counsel for the defendant objected that there was no evidence to be left to the jury of a breach of the contract before the declaration of war or before the same was known at Odessa. The Lord Chief Justice overruled the objection, reserving leave for the defendant to move the Court of Queen's Bench to enter a verdict in his favour on the issue joined upon his said 2d plea, if that Court should be of opinion that there was no evidence of such a breach.

The case was then left to the jury, who found a verdict upon the said issue for the plaintiffs.

On the 5th of November last, a rule was granted by the Court of Queen's Bench calling upon the plaintiffs to show cause why the verdict should not be set aside and a verdict entered for the defendant on the said issue, on the ground that there was no evidence on which a jury could find a breach of the contract before the declaration of war, and before the same was known at Odessa.

Cause was shown by the plaintiffs against the said rule: but the Court made it absolute on the 26th of November last.(*a*)

*Against that decision of the Court of Queen's Bench the plaintiffs now appealed, pursuant to the provisions of The Common Law Procedure Act, 1854. And they submitted that the said rule ought to have been discharged, on the ground that there was evidence of a breach of the said contract before the 28th of March, 1854 (on which day war was declared between England and Russia), or before the 1st of April, 1854 (on which day the fact of the said war having been declared was known at Odessa). [*959

The case was argued in last Easter Term.(*b*)

Manisty, for the appellants (plaintiffs below).—There was evidence of a breach of contract by defendant before the notice of the declaration of war. War was declared on 28th March, and known at Odessa on 1st April. It appears that, on the 4th, 5th, and 6th of March, the master of the Themis had interviews with the defendant's agent, who then mentioned the prohibiting ukase of the Russian government. That prohibition would not be an answer to the right of the plaintiffs, or prevent a breach. There were to be forty-five running days from the time of the ship's arrival: they did not expire till long after the declaration of war was known at Odessa. Now it is important to distinguish between a dispensation on one side and a breach on the other; and, again, between both these and a rescinding. It is not questioned that a contract may be broken before the time of performance: but it is said that this can only be where both parties assent to treating the contract as broken. But, though that circumstance may make a *difference as to the amount of damages, the contract may, in point of law, be broken by the act of a single party. [*960 The agent of the defendant had here, before the declaration of war, renounced the contract; and this renunciation he could not retract; the breach was therefore complete. Suppose a contract is made, on 1st June, to deliver coals on 1st July, unless in the mean time a strike of workmen should take place (a contract not uncommon in the north

(*a*) Reid *v.* Hoskins, 5 E. & B. 729 (E. C. L. R. vol. 85), where the record is rather more fully set out. There was also a demurrer to the 2d plea, on which judgment was given, in the Court of Queen's Bench, for the defendants; Reid *v.* Hoskins, 4 E. & B. 979.

(*b*) May 2d, 1856. Before Jervis, C. J., Pollock, C. B., Cresswell, Crowder, and Willes, Js., and Alderson, B.

of England): and suppose that on 8th June the party who is to deliver the coals declares to the other party that he will not deliver the coals; and the other party insists on the contract; and that, again, on 15th June, the party who is to deliver declares that he persists in his intention not to deliver, the other party still insisting on the contract; and on 20th June a strike takes place: surely the party who was to deliver is liable for breach of contract. [JERVIS, C. J.—The plaintiffs do not say, "Well, as you will give me no cargo, we shall be off;" but they continue to wait for the cargo: is the defendant to have no locus pœnitentiæ?] Can that state of things go on till the performance becomes impossible? [CROWDER, J.—Could you have brought an action for the breach before the declaration of war?] Yes. [JERVIS, C. J.—Suppose the defendant loads after the delivery of the declaration in the action and before plea pleaded.] There would then be a breach, entitling the plaintiffs to at least nominal damages, unless indeed it should be held that the breach is waived by the acceptance of the cargo; but, on that view, the argument does not meet the present case. If A. contract to marry B. on a given day, but before that day marries C., an action may be maintained at once. [POLLOCK, C. B.—Suppose a man contracts to sell a horse, but kills it before the day on
*961] *which it was to be delivered.] Or suppose he sells it to another. [POLLOCK, C. B.—The law in such a case does not notice the probability of his repurchasing.] That principle applies here. The assent of the other party has nothing to do with the question: such assent would relieve the contractor; it would constitute a rescinding, not a breach. Cort *v.* Ambergate, &c., Railway Company, 17 Q. B. 127 (E. C. L. R. vol. 79), is an instance of a breach of contract by the contractor giving notice that he will not perform it. [JERVIS, C. J.—Both parties there waived the act which the plaintiffs would have had to perform.] It is perhaps rather a case of dispensation. In Hochster *v.* De La Tour, 2 E. & B. 678 (E. C. L. R. vol. 75), it was held that the contract was broken by a party who, before the time of performance arrived, announced that he would not perform it. [JERVIS, C. J.—That came on upon motion in arrest of judgment; and the record alleged that the defendant had wrongfully broken the agreement. In King *v.* Gillett, 7 M. & W. 55,† to an action for breach of promise of marriage defendant pleaded exoneration by the plaintiff before breach, not averring any act of the defendant; and this was held good: but the Court there say: "we think the defendant will not be able to succeed upon it at Nisi Prius, in case issue be taken upon it, unless he proves a proposition to exonerate on the part of the plaintiff, acceded to by himself."] He adds that this would be a rescinding of the contract: the effect would be, not that there had been no breach, but that no contract remained in existence. [JERVIS, C. J.—The principle rather is that,

till the defendant assented, the plaintiff *might revoke the exoneration.] But it would be good, if not revoked. [*962

Wilde appeared for the respondent.

Per CURIAM.—At present, we think it will not be necessary to hear Mr. *Wilde:* but we will wait till we have heard the argument in Avery *v.* Bowden. *Cur. adv. vult.*

In Avery, appellant, against Bowden, respondent, the appellant, George Avery, was plaintiff below, and the respondent, Samuel Wilson Bowden, was defendant below.

The case stated for the opinion of the Court of Appeal disclosed the following circumstances.

This was an action upon two charter-parties: by one of which it was agreed that the plaintiff's ship, The Rolla, then expected at Falmouth or Queenstown, should proceed in ballast to Constantinople and thence to Odessa, and there load a certain cargo, and should therewith proceed to Hull, and there deliver the same on payment of certain freight. And it was, by the said charter-party, further agreed that, in case of war having commenced previous to and continuing on the ship's arrival at Constantinople, the defendant was to load the said ship at that port at 10*s.* per ton less than at Odessa.

The first count of the declaration, after setting out the purport of the said charter-party, averred that the said ship proceeded in ballast to, and arrived at, Constantinople; and that, previous to the said ship's arrival at Constantinople as aforesaid, war had commenced; and that the said war was continuing on her said arrival *there, and during all her stay there: whereupon the defendant became liable to load the said ship there at 10*s.* per ton less than from Odessa: but that the defendant made default in loading at Constantinople the agreed cargo, whereby the said ship was obliged to return in ballast to Great Britain. [*963

By the other of the said charter-parties it was agreed that the plaintiff's ship called the Lebanon, then in London, should proceed in ballast to Constantinople, and thence to Odessa, or so near thereto as she might safely get, and there load from the factors of the defendant a full and complete cargo of tallow, wheat, seed, or other stowage goods or grain, and should therewith proceed to Hull, and there deliver the same on being paid freight as in the said charter-party mentioned; forty-five running days to be allowed the defendant (if the ship should not be sooner despatched) for loading and unloading, to commence at her port of loading on her being ready to load, and at the port of discharge to commence on the day after her arrival and report at the Custom House, and being ready to unload. (Additional days to be allowed in a particular case.)

The second count of the declaration, after setting out the purport of the said last-mentioned charter-party, averred that the said ship pro-

ceeded in ballast to Constantinople, and thence to Odessa; that the ship remained at Odessa a large part of the said forty-five running days, calculated as in the said charter-party mentioned; and was ready to stay there the residue of the said running days, and also on demurrage, over and above the said forty-five running days: but the defendant dispensed with the said ship remaining at Odessa for any part of the said residue of the said *running days, or on demurrage: and the defendant requested the said ship to depart from Odessa without remaining at Odessa for any part of the said residue of the said running days, or on demurrage, and without the said agreed cargo; and the plaintiff, in the said second count, averred that, save remaining at Odessa for the said residue of the said running days or on demurrage, all things happened and were performed to entitle him to have the agreed cargo loaded on board the said ship; and that the time for so doing had elapsed. Yet the defendant had made default in loading the agreed cargo; and that no cargo whatever had been loaded by the defendant on board the said ship according to the said charter-party or otherwise: whereby the said ship was obliged to return in ballast to Great Britain: and the plaintiff had incurred certain expenses in the said charter-party mentioned.

*964]

The defendant pleaded, to the 1st count, that war had not commenced previous to the said ship's arrival at Constantinople, and was not continuing on her said arrival, in manner or form in the said first count alleged.

And the defendant, by his 5th plea (which was pleaded to the 2d count), said that the plaintiff and defendant were British subjects, and that the said ship in that count mentioned was a British registered vessel, and that Odessa was a port in the Empire of Russia: and that, after the making of the said charter-party, and after the said vessel arrived at Odessa, and before the defendant dispensed with the said ship remaining at Odessa as in the second count mentioned, and before the accruing of the causes of action in the second count mentioned, war was declared between our Sovereign Lady the Queen and the Emperor of Russia; and the *plaintiff and defendant had notice at Odessa of the said war having been so declared as aforesaid. And the defendant further said that, from the time war was so declared as aforesaid, and so became known at Odessa as aforesaid, Odessa was a hostile port in the possession of the Queen's enemies; and it became and was impossible for him the defendant to fulfil the said charter-party and to load a cargo at Odessa without trading and corresponding with the Queen's enemies: and it became and was impossible for the said ship to remain at Odessa for the residue of the said running days, and for the plaintiff to receive a cargo on board the said ship according to the terms of the said charter-party without the plaintiff's trading and corresponding with the Queen's enemies: and that neither the plaintiff nor

*965]

the defendant had procured, or were able to procure, any license from the Queen to load a cargo at Odessa: of all which the plaintiff and the defendant then had notice: and that, by reason of the premises, the said charter-party, before the accruing of the said alleged causes of action in the said second count mentioned, became and was wholly rescinded.

The plaintiff joined issue on each of the said two pleas.

The cause came on for trial at Guildhall before the Lord Chief Justice of the Court of Queen's Bench: when it was proved, with reference to the issue joined on the said plea to the first count, that the plaintiff and the defendant were both British subjects, and that the said ship called the Rolla was a British registered ship; and that the said ship arrived at Constantinople on the 24th of March, 1854. That subsequent to the making of the said charter-party, and previous to her said arrival *there, war had been declared between Turkey and Russia, and such war was continuing on her said arrival there, and had continued ever since. It was also proved that, very soon after the arrival of the said ship at Constantinople (that is to say on the 28th day of March, 1854), war was declared between England and Russia, and that such war had continued ever since. [*966

Upon these facts the jury, by the consent of both parties, and under the direction of the learned judge, found a verdict upon the said issue for the plaintiff, leave being reserved for the defendant to apply to the Court of Queen's Bench to set that verdict aside, and to enter it for the defendant, if the Court should be of opinion that upon the said facts the verdict upon the said issue ought to be so entered.

With reference to the issue joined on the said 5th plea, it was admitted that the plaintiff and the defendant were British subjects, and the said ship called the Lebanon was a British registered vessel. It was proved that the said ship arrived at Odessa on the 11th of March, 1854: that she was ready to receive cargo on the 17th of that month; of which the defendant's agent at Odessa then had notice: that war was proclaimed by England against Russia on the 28th of the same month; which fact was known at Odessa on the 1st day of April, 1854. That the said ship remained at Odessa waiting for cargo till the 18th of the same month of April; on which day she left Odessa and returned to England in ballast. The jury found that, after the said 1st day of April, a cargo could not have been loaded on board the said ship at Odessa without the plaintiff and the defendant trading with the Queen's enemies.

The plaintiff also called several witnesses, who stated *that they were present at several interviews at Odessa between the master of the Lebanon and the agent at Odessa of the defendant, after the ship was ready to receive cargo, and both before and after the 1st day of April, 1854. That, on each of those occasions, the master of [*967

the Lebanon asked the defendant's agent if he had any cargo for him; and that the said agent, on each occasion, said that he had not any cargo for him. One of the plaintiff's witnesses, Captain Parsons, deposed that he was with the master of the Lebanon almost daily, when he asked the defendant's agent if he had any cargo for him, and he said he had not. Another of the plaintiff's witnesses, Allan Dodds, deposed that on one occasion, after the 1st of April, and one or two days before the Lebanon left Odessa, the defendant's agent told the master of the Lebanon that he had no cargo for him, and that he had better go away. The plaintiff was also examined as a witness on his own behalf. He stated that, on the 24th of April, 1854, he had an interview (*a*) with the defendant; when he, the plaintiff, said to the defendant, "I have come to inquire about the ship;" and the defendant said, "I have no cargo for the Lebanon." The plaintiff said it was very hard that his ship should come home in ballast, and that the defendant observed it would be equally hard if he had put a cargo of seed on board into the plaintiff's ship and she had been captured and blown to pieces by the Russians. That the defendant further said he had determined not to load the Lebanon, but rely on the chapter of accidents;
*968] that the captain *of the Lebanon might do something illegal or informal which might invalidate the charter-party. That he had telegraphed to his agent at Odessa not to purchase a cargo of seed; and that his original intention had been to ship wheat, but, owing to a prohibition by the Russian Government, that could not be done: and, on cross-examination, the plaintiff said that the defendant did not say when he sent the telegraph out not to buy a cargo.

It was proved that several British ships, which arrived at Odessa after the Lebanon arrived there, got cargoes, but that several others which arrived both before and after the Lebanon did not succeed in getting a cargo.

No evidence was offered on the part of the defendant.

Upon the evidence so given on the part of the plaintiff, the learned Judge left it to the jury to say whether the defendant, before war was declared, dispensed with the ship's remaining at Odessa as in the 2d count alleged; and whether the defendant before the 1st of April, when the declaration of war was known at Odessa, had broken his contract. The jury answered both of these questions in the affirmative, and found a verdict for the plaintiff on the issue joined on the said 5th plea, leave being reserved to the defendant to apply to the Court of Queen's Bench to set that verdict aside and enter a verdict for the defendant upon that issue, if the Court should be of opinion that there was no evidence to go to the jury of a breach of the charter-party by the defendant before the declaration of war was known at Odessa.

(*a*) It was agreed, upon the argument, that this interview took place at Hull, in England. The conversation was not noticed in the Court below.

On the 5th day of November, 1855, the Court of Queen's Bench granted a rule calling upon the plaintiff to show cause why the verdict found for the plaintiff on *each of the said issues should not be [*969 set aside, and why a verdict should not be entered for the defendant on the first of the said issues, on the ground that it appeared that no war was declared when the said ship, the Rolla, arrived at Constantinople; and on the last of the said issues, on the ground that there was no evidence to go to the jury of a dispensation to the plaintiff to wait the lay days, or of a breach of the said charter-party before the declaration of war between Great Britain and Russia was known at Odessa.

The rule was argued; and, on the 26th day of November, 1855, the Court of Queen's Bench decided that it should be made absolute to enter a verdict for the defendant on both the said issues; and it was made absolute accordingly.(*a*)

Against that decision of the Court of Queen's Bench the plaintiff now appealed to this Court; and he submitted that the said rule of the 5th day of November, 1855, should have been discharged.

The case was now argued.

Bovill, for the appellants (plaintiff below).—First, a war between Russia and Turkey satisfied the contingency in the first charter-party. The stipulation was introduced on account of the unwillingness of the shipowner to allow his ship to go into a port of a country engaged in war. His objection would be raised by any war in which Russia, the country owning Odessa, might be engaged. It is quite true that every possible war between any two countries could not be pointed at, though the language of the charter-party is general. *But, if any limi- [*970 tation is to be put on the language, it is that suggested by the fact that Odessa was a Russian port: if this limitation be not adopted, no reason can be shown for incorporating any limitation at all; a view which would entitle the plaintiff to judgment. To introduce a limitation to a war with England appears perfectly arbitrary. The Court below appears to have considered that the meaning must have been a war rendering the performance of the contract unlawful. But there is nothing in the charter-party pointing to such a test. [ALDERSON, B. —Do you say that a war between Russia and Sweden would be within the meaning?] It would.

As to the case of the Lebanon. The Court below holds that there was no evidence for a jury of a dispensation by the defendant before the declaration of war. It seems indeed that, at first, they thought there was such evidence.(*b*) But, finally, they decided that there was no such evidence, sufficient to go to the jury, because there was no

(a) Avery *v.* Bowden, 5 E. & B. 714 (E. C. L. R. vol. 85), where the record is rather more fully set out.

(b) Avery *v.* Bowden, 5 E. & B. 721.

assent to the dispensation on the part of the plaintiff. That the defendant's agent had absolutely renounced all intention of loading the ship, and had communicated this resolution to the captain, appears from what passed between them, especially when connected with the conversation at Hull between the plaintiff and defendant. The captain would not then suppose that he was required to wait. The right of action was complete by the dispensation; Jones *v.* Barkley, 2 Doug. 684. [Alderson, B.—The meaning of the defendant's agent might be that he had no cargo ready at the time of his speaking.] That might possibly
*971] be the meaning; *but it is at the very least equally possible that the meaning was that he would provide no cargo at all: and then there was a question for the jury: and the probability in favour of the latter interpretation is much strengthened by the refusal not merely taking place on the first arrival of the vessel, but being repeated day after day. [Pollock, C. B.—When the question is whether a fact occurred on Tuesday, evidence that it must have occurred on either Tuesday or Wednesday does not support the affirmative.] It is some evidence, however slight. [Pollock, C. B.—I do not understand that the question here was, whether there was any scintilla of evidence: the question reserved was whether there was evidence on which a jury would be justified in finding for the plaintiff. There is surely a distinction between a reservation of the point and a bill of exceptions.] The jury in fact found for the plaintiff: therefore, if there was anything to go to them, the appeal must be allowed unless the assent of the plaintiff to the dispensation was necessary; the want of the assent was the sole ground of the decision of the Court below. As to this point, the Court of Queen's Bench referred to Hochster *v.* De La Tour, 2 E. & B. 678 (E. C. L. R. vol. 75), and Cort *v.* Ambergate, &c., Railway Company, 17 Q. B. 127 (E. C. L. R. vol. 79), and distinguished those cases from the present: but the distinction suggested is not borne out by the cases. That the dispensation, when once given by the defendant, was irrevocable appears also from Laird *v.* Pim, 7 M. & W. 474.†

Mellish, contrà, was not called upon.

*972] *Pollock, C. B.—We are all of opinion that the judgments of the Court of Queen's Bench in both these cases ought to be affirmed.

In Reid *v.* Hoskins, Mr. *Manisty* contended that, there being certain of the running days unexpired within which the defendant was to provide a cargo, and the defendant having, before such expiration, declared that he had no cargo, that was substantially a breach of defendant's contract. He argued that, whenever a party, within the time which he has for doing an act, refuses to do it, a right of action immediately accrues to the other party, although the breach may indeed be afterwards healed by a performance within the time: but that, if before the expiration of the time anything happens which makes the perform-

ance illegal, then the contract may be considered to have been substantively broken within the time. I am of opinion that this is not a correct view of the law. The running days are allowed for the benefit of the shipper; he has the whole time for the performance of his contract. If, before that expires, the performance becomes illegal, he is discharged from performance; and the other party can maintain no action. In this case, therefore, the judgment of the Court of Queen's Bench must be affirmed.

The case of Avery *v.* Bowden having been much associated with that of Reid *v.* Hoskins, and there being some resemblance between the facts of the two, we deferred our judgment in the case which was first argued till we should have heard the argument in the other. I think the judgment of the Court of Queen's Bench *in Avery *v.* Bowden is perfectly right. I think there is no evidence of a dispensation before the notice or declaration of war. I suggested, during the argument, a distinction between the case of a point reserved for the Court and that of a bill of exceptions. When the question, whether there is evidence to go to the jury, is reserved by consent (and it cannot be reserved without consent), "no evidence" means "no reasonable evidence." Where the evidence is such that the Court, had there been no other evidence and the jury had acted upon it, must have set the verdict aside, that, on such a reservation, is no evidence. The [*973

members of the profession, if they object to this, may always refuse their consent to the case being reserved: if they give their consent, they consent to the verdict being altered if no reasonable evidence has been laid before the jury. It would be absurd to send a case down to a new trial where, if the jury should find in accordance with the evidence which is relied upon, it would be the duty of the Court to set such verdict aside as being contrary to the weight of evidence. Nor am I sure, even in the case of a bill of exceptions, though there the language seems to go further and to raise the question whether there was evidence tending to support the issue, that, if a witness declared an event to have happened on Tuesday or Wednesday, that would be any evidence that it happened on Tuesday. Where the maxim of omnia ritè acta presumuntur applies, there indeed, if the event ought properly to have taken place on Tuesday, evidence that it did take place on Tuesday or Wednesday is strong evidence that it took place on the Tuesday. But, even in the case of a bill of exceptions, the evidence ought to be such as to support the issue, and *not merely such as to suggest a conjecture. Here I think there was no evidence of a dispensation before the war. [*974

CRESSWELL, J.—Certainly there has been a little fluctuation in the view taken by the Courts of Westminster of the point to which the Lord Chief Baron has adverted. Lord Tenterden said that, if the evidence was such that the jury could conjecture only but not judge,

it ought not to go to the jury: that the onus was on the party offering the evidence; and that he, if he offered only evidence consistent with either supposition of fact, was not entitled to have it put to the jury. Afterwards the practice got in of adhering more closely to the language in which motions for new trials are made, where the question is stated to be whether there was "any evidence;" and it was said that this must be answered in the affirmative if there had been a scintilla of evidence. So, on a bill of exceptions, the counsel contend that there was evidence fit for the consideration of the jury to sustain such issue. But, if the evidence lead only to conjecture, it is not fit for the consideration of the jury. Here all that it is proposed to send to the jury is that, before and after the 1st of April, the master asked the defendant's agent whether he had any cargo, and the agent said he had not. In order to make out the plaintiff's case, you must engraft upon this that the agent meant the master to understand that he, the agent, did not mean to provide any cargo. Suppose an action for a breach of promise of marriage, and the evidence to show a fluctuating attachment, but no promise: no man could say that such proof of itself was sufficient to go to the jury. I think the Court below were quite
*975] *right. I observe that Lord Campbell relies on a double ground: he thinks the language can hardly amount to a renunciation of the contract by the defendant's agent; but he also adds that, if it were much stronger, it would not constitute a cause of action when the master continued to insist upon having a cargo.

Alderson, B.—I am of the same opinion. I do not think there was any evidence of dispensation.

Crowder, J., concurred.

Pollock, C. B.—As to the other point, Mr. *Bovill* did not contend that any war between any two countries would be within the stipulation. But I have no doubt that no war would be so, except one between Russia and England.

Alderson, B., concurred.

Cresswell, J., and Crowder, J., concurred.

Judgment affirmed.

*MARDALL *v.* THELLUSSON and Others, Executors of WILLIAM THEOBALD, deceased. *Nov.* 12. [*976

An executor sued, as such, for a debt which accrued to the plaintiff from the testator in his lifetime, cannot set off a debt (alleged to be equal to the damages sued for) for money had and received to defendant's use, as executor, and money due on an account stated with him, as executor, since the death of the testator; the debt sued for and the debt sought to be set off not being mutual within stat. 2 G. 2, c. 22, s. 13.

By the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench.

ASSUMPSIT. The first three counts stated that the testator William Theobald, in his lifetime, was indebted to the plaintiff for work and labour, money paid, and money due on an account stated, respectively; averring promises by testator in his lifetime. The fourth count set out a special contract between plaintiff and testator, and a breach thereof by the latter. The fifth count was for money due from defendants, as executors, on an account stated between plaintiff and defendants as executors, averring a promise by defendants as such executors. Damages, 200*l.*

Pleas: 1, to 1st, 2d, 3d, and 4th counts, that testator did not promise, &c.; 2, to fifth count, that defendants did not promise, &c. Issue thereon.

Third plea: to the first, second, third, and fifth counts. That plaintiff before and at the time of the commencement, &c., was, and still is, indebted to defendants, as executors, in 200*l.* for money had and received by plaintiff to the use of defendants, as executors as aforesaid, and for money due from plaintiff to defendants as executors, on an account stated between them; "which said sum of money so due to the defendants equals the damages sustained by the plaintiff by reason of the non-performance," &c., "and out of which said sum of money so due," &c., defendants offer to set off and allow to plaintiff "the full amount of the last-mentioned damages." *Replication to third plea, traversing the set-off. Issue thereon. [*977

Plea 4, to 4th count, traversing an allegation therein. Issue thereon.

The case was tried before Lord Campbell, C. J., at the Middlesex Sittings after Hilary Term, 1852, when a verdict was found for the defendants on all the issues except that on the 4th plea, on which the verdict was for the plaintiff. The Court of Queen's Bench afterwards made absolute a rule for entering the verdict for the defendants on the last-mentioned issue. Afterwards, a rule Nisi was obtained for entering judgment for the plaintiff, non obstante veredicto, on the issue on the replication to the third plea; which rule was afterwards discharged.(*a*)

Afterwards, by order of Lord Campbell, C. J., the postea was

(*a*) See Mardall *v.* Thellusson, 18 Q. B. 857 (E. C. L. R. vol. 83), where the report states the proceedings as they were finally entered upon the amendment after mentioned in the text.

amended by entering the verdict on the first and second issues (those on the first and second pleas) for the plaintiff.

Judgment having been entered in the Court of Queen's Bench for the defendants, the plaintiff brought error in the Court of Exchequer Chamber.

Gates, for the party suggesting error (plaintiff below), was not called on.

C. W. Wood, for the defendants below.—The Court of Queen's Bench has discharged a rule for entering judgment non obstante veredicto on the issue on the third plea: (*a*) and the question raised in the present state *of the record is whether the plea furnishes a good answer to the first, second, third, and fifth counts. For the plaintiff it is contended that the decision in the Queen's Bench must be considered as overruled by Rees *v.* Watts, 11 Exch. 410.†(*b*) But that case is distinguishable. [CROWDER, J.—The Court of Exchequer Chamber, including Coleridge, J., and Erle, J., who were parties to the judgment in Mardall *v.* Thellusson, 18 Q. B. 857 (E. C. L. R. vol. 83), distinctly express their dissent from that decision. CRESSWELL, J.—I can assure you that, after much consideration, we felt ourselves compelled to overrule Mardall *v.* Thellusson.] That would be extrajudicial, if Rees *v.* Watts can be supported on grounds not applicable to Mardall *v.* Thellusson. Now in Rees *v.* Watts the administrator was plaintiff, not, as the executors here, defendant; and the importance of this distinction is pointed out in Mardall *v.* Thellusson by Crompton, J., who says in the course of the argument: "There is this distinction, as regards a set-off, between an action by, and an action against an executor: that in the first case the assets might be affected, if the defendant set off a debt due from the testator to him: in the second case the assets would not be affected." The executors may be considered as representing only the assets: the plaintiff who sues the executors insists that the assets owe him so much; the executors answer that the plaintiff owes the assets so much: these are mutual debts, which may be set off one against the other without interfering with the due application of the assets to debts in their proper order. Whereas, when the executors sue a defendant for a debt due to the assets, the set-off, if allowed, would give the defendant the means of satisfying *his debt out of the assets although there were debts of a higher order, due from the assets, unsatisfied. The mutuality of the debt means a mutuality as between the funds called upon: that exists in one case, but not in the other. This distinction was indeed not pressed in the argument in Rees *v.* Watts, 11 Exch. 410,† because there it was for the interest of the defendant below that the case should be considered as not distinguishable from Mardall *v.* Thellusson, 18 Q. B. 857 (E. C. L. R. vol.

*978]

*979]

(*a*) See note on preceding page.

(*b*) In Exch. Ch., affirming the judgment of Exch. in Watts *v.* Rees, 9 Exch. 696.†

83). If stat. 2 G. 2, c. 22, s. 13, had merely the words "where there are mutual debts between the plaintiff and defendant," such debts as are here shown are mutual: but the additional words, "or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party," are surely wide enough to comprehend the case. At any rate they do not restrict the effect of the earlier words. [ALDERSON, B.—Can a debt be mutual on one side and not on the other?] When the executors are defendants it is mutual on both sides; when they are plaintiffs it is not mutual on either side. The argument on the other side is much like that which failed in Slipper *v.* Stidstone, 5 T. R. 493, where the attempt was to show that a debt due to a defendant as surviving partner could not be set off against a demand on him in his own right. In Shipman *v.* Thompson, Willes, 103, and Tegetmeyer *v.* Lumley (*a*) the executors were plaintiffs. [POLLOCK, C. B.—In Watts *v.* Rees, 9 Exch. 696,† the Judges of the Court of Exchequer Chamber all expressed their surprise at the decision in Mardall *v.* Thellusson; then the Court of Exchequer Chamber, including two Judges who had been *parties to the judgment in Mardall *v.* Thellusson, 18 Q. B. 857 (E. C. L. R. vol. 83), expressly overruled it in Rees *v.* Watts, 11 Exch. 410.†] [*980 Then, further, the decision in Mardall *v.* Thellusson is overruled by Rees *v.* Watts, at any rate, only on the point decided in Mardall *v.* Thellusson, namely, as to the allowance of a set-off for money had and received to the use of the executors. But the plea also sets up a set-off for money due from plaintiff to defendants, as executors, on an account stated between them. As to this, it was not necessary for the Court of Queen's Bench, according to the view which they took, to pronounce any decision; and they did not pronounce any. The question therefore is at least open. And in Rex *v.* Watts, 11 Exch. 416,† the Court of Exchequer Chamber point out that Holroyd, J., in Ashby *v.* Ashby, 7 B. & C. 444, 451 (E. C. L. R. vol. 14), states that on a count on an account stated with executors the only admissible evidence against them would be of accounts of debts from the testator; and they add that Blakesley *v.* Smallwood, 8 Q. B. 538 (E. C. L. R. vol. 55), "is only an authority to this extent—that an account stated by an executor as such, must be taken to show a debt due from his testator to the other party, and against this it is clear that a debt due from that other party to the testator may be set off." The set-off may therefore be here supported as to the account stated. [CRESSWELL, J.—Could the Judge at Nisi Prius reject evidence on the bad part of the plea? Would not that be to reverse the rule that, the worse the plea, the more strictly must it be proved? Might you not as well say that where damages are given generally on two counts, one good and the other bad, they are to be intended as given in respect of the good count only? But I am not

(*a*) Note (*a*) to Hutchinson *v.* Sturges, Willes, 264.

*981] *sure that you are right in supposing that the Court of Exchequer Chamber sanctioned the dictum of Holroyd, J., in Ashby *v.* Ashby, 7 B. & C. 451 (E. C. L. R. vol. 14).] It is not necessary for the defendants here to contend for the accuracy of that dictum to its full extent; but the language of the Court of Exchequer Chamber shows that Blakesley *v.* Smallwood, 8 Q. B. 538 (E. C. L. R. vol. 55), is not overruled. [POLLOCK, C. B.—Can we split the plea of set off?] It may be supported, after verdict, if any part of it show a good answer. [BRAMWELL, B.—You say that the money due on the two grounds of set-off "equals the damages sustained by the plaintiff." If one of the grounds fails, the money due in respect of the other ground will fall short of these damages.] The Court will not assume, after verdict, that anything was found to be due in respect of the ground which failed. It appears that the plaintiff below has not pursued the regular course in bringing error: this Court, if they overrule the decision below, are, by sect. 157 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), to give such judgment as the Court below ought to have given. There should be a venire de novo, as allowed by R. Hil. 16 Vict. s. 24.(*a*) [BRAMWELL, B.—I know what the object of those regulations was. The Courts of Error could formerly only reverse the judgment below: they are afterwards enabled to give the right judgment.]

Per CURIAM.(*b*)

Verdict to be entered for plaintiff on the issue on the third plea; and writ of inquiry awarded.

(*a*) 1 E. & B. lxxxii. (E. C. L. R. vol. 72).

(*b*) Pollock, C. B., Alderson, Cresswell and Crowder, Js., and Bramwell and Watson, Bs.

A debt created with an executor may be set off against a debt due by the deceased, in his lifetime, to the same person: Antony *v.* Miller, 1 Georgia, 30. A set-off cannot be admitted in a suit brought by or against executors or administrators, when it disturbs the due course of distribution of the assets: Murray *v.* Williamson, 3 Binn. 135; Basler *v.* Exchange Bank, 4 Barr, 34; Light *v.* Leininger, 8 Barr, 403; Galloway's Appeal, 6 Barr, 37.

*982] *ROBERT GRACE *v.* CHARLES WILMER. *Nov.* 17.

A practising attorney, suing in person, still has an absolute privilege to lay and retain the venue in Middlesex. The Court refused to change the venue, though the cause of action arose elsewhere, and though the balance of convenience was against the trial in Middlesex.

C. MILWARD, in this Term, on behalf of the defendant, obtained a rule to show cause why the venue should not be changed from Middlesex to the southern division of Lancashire. A summons to the same

effect had been taken out before Crompton, J., who endorsed it "No order, without prejudice to an application to the Court." By the affidavits, used at Chambers and in this Court, it appeared that the plaintiff was a practising attorney, carrying on business in Liverpool and Birkenhead, and that he sued the defendant for libels published in a Liverpool newspaper, concerning the plaintiff's professional conduct in Liverpool and Birkenhead. The defendant proposed to justify the proposed libel: and it was deposed that all the witnesses on both sides resided in Liverpool and its vicinity, and that a trial would be both more convenient and less expensive at Liverpool than at Westminster. But the plaintiff was a practising and certificated attorney; he sued in person; and he had laid the venue in Middlesex.

Prentice now showed cause.—Before the Uniformity of Process Act (2 & 3 W. 4, c. 39), an attorney might lay the venue in Middlesex, and it could not be changed on the common affidavit; Pye *v.* Leigh, 2 W. Bl. 1065: nor upon an affidavit showing that the trial might be more conveniently conducted in the country; Pitcher *v.* The Sheriff of Monmouth, 2 Marsh. 152 (E. C. L. R. vol. 4). Besides, in this case, the plaintiff will *be delayed in the trial by the proposed change [*983 of venue.

C. Milward, in support of his rule.—The privilege of an attorney is only when he sues as an officer of the Court; Mounsey *v.* Watson, 7 B. & C. 683 (E. C. L. R. vol. 14). [WIGHTMAN, J.—Before the Uniformity of Process Act (2 & 3 W. 4, c. 39), an attorney of this Court might sue as such by attachment of privilege; and if he did not he waived his privilege: but since that Act, he cannot sue by attachment of privilege; and therefore it is enough if he sues in person; Cutts *v.* Surridge, 4 Dow. & L. 373, Wright *v.* Skinner, 1 M. & W. 144.† ERLE, J.—The defendant has at common law a right to have the venue laid where the cause of action arose; and, if nothing is shown to the contrary, the venue is changed on what is called the common affidavit; but, if the plaintiff shows that the balance of convenience is in favour of the trial at the venue which he has laid, he keeps the venue there, so that the balance of convenience supersedes the defendant's common law right. If it can be shown that it will also supersede the plaintiff-attorney's common law privilege to lay and retain the venue in Middlesex, this rule should be absolute. COLERIDGE, J.—The privilege prevailed in Pitcher *v.* The Sheriff of Monmouth, where the facts were much like these.]

Lord CAMPBELL, C. J.—I regret very much that we cannot make this rule absolute. I have no doubt that the change of the venue to Lancashire would promote justice, and lead to a more convenient trial: and, if I *did not think that an absolute privilege was still given [*984 by law to a plaintiff-attorney, suing as this plaintiff does in person, to lay the venue in Middlesex, I should say that the rule should

be absolute. But it appears settled by authority that this privilege did belong to an attorney before the Uniformity of Process Act unless he waived it, as he did unless he sued by attachment of privilege. There was no intention on the part of the Legislature, when the bill of privilege was abolished, to make any change in the rights of parties: and here the plaintiff has done nothing whatever to waive his privilege. Then there cannot, it seems to me, be any privilege to lay the venue in Middlesex unless it be an absolute one. There would be no privilege at all if we were, before allowing it, to consider whether its exercise was more or less convenient. We must abide by the law as it is. I think that it will lie within the legislative power of the Judges to make a rule abolishing such privilege in future; and I shall submit to my brethren the propriety of so doing: but at present I act judicially; and, though I am convinced that the trial would be more conveniently conducted in Liverpool, at the place where the facts happened, I must decide that the plaintiff has de jure the right to lay and retain the venue in Middlesex.

COLERIDGE, J.—Privileges originally given on grounds which have ceased to exist ought to be abolished; but whilst they continue to exist they are the legal right of those entitled to them, and they are not to be taken away by a side wind. Now this privilege of an attorney existed before the Uniformity of Process Act: and unless the attorney-plaintiff waived his right he had it; but if he did not sue in a particu

*985] lar form he waived it. Was *then the right taken away when he was compelled always to sue in a different form? The decisions are that he no longer waives his right by not suing in that form when he has not the power to do so. Then, this being the attorney's right, I cannot find that it has ever been qualified according to convenience.

WIGHTMAN, J.—The plaintiff, being an attorney suing in person, claims a privilege to lay and retain the venue in Middlesex. The first question is, Whether that privilege continues since the Uniformity of Process Act. Now the decision of my brother Patteson, in Cutts *v.* Surridge, 4 Dow. & L. 373, is that it does; and in Wright *v.* Skinner, 1 M. & W. 144,† the Court of Exchequer decided that since the Uniformity of Process Act an attorney suing in person waived no privilege, though he did not designate himself as an attorney on the record. So this plaintiff has his privilege if he thinks fit to exercise it. Then is there anything in this case to interfere with that privilege? It is true that the balance of convenience is in favour of the change; but that consideration does not apply where the right to lay the venue is personal.

ERLE, J.—Two Courts having decided that the privilege still exists, we are bound judicially to give effect to it. I cannot help feeling that the privilege is founded on a fiction that these officers of the Court are always here personally. In general, considerations of justice and con-

venience decide where the venue should be; but that rule does not apply where the plaintiff is an attorney or other officer of the Court.

Rule discharged.

*WILLIAM GUDGEN *v.* JAMES BESSET. [*986

G. having agreed to let premises to P. for a term of years, P. paying 100*l.* for the fixtures, a lease by deed was prepared, and engrossed on parchment. B. paid down only 50*l.*; it was agreed between G. and P. that P. should be let into possession as tenant from year to year on the terms of the intended lease until he paid the balance of the 100*l.* At the same time G. signed, sealed, and delivered the deed, which however he retained in his own possession. No third person was present. No words qualifying the delivery, or expressly stating that it was as an escrow till the payment of the balance, appeared to have been used. G. brought use and occupation against the assignee of P.'s interest: and, on those facts appearing at the trial, an objection was taken that the action ought to have been on the covenants in the deed.

Held: that the circumstances warranted an inference in fact that it was agreed by both G. and P., at the time of the execution of the instrument, that it should not operate as a lease until the payment; and that, if there was such an agreement by both, though no express words of delivery as an escrow were used, it would not operate as a deed till then; and consequently, P. was tenant from year to year under the terms in the instrument, and not tenant under a deed; and that the action for use and occupation would lie against him or the assignee of his interest.

ACTION for use and occupation. Plea: Never indebted. Issue thereon.

On the trial, before Wightman, J., at the London Sittings after Trinity Term, 1856, it appeared that the plaintiff was entitled for a term of years to the possession of the premises, and that in 1854 he had agreed with one Patullo to let the premises to him for a term of forty years, Patullo paying 100*l.* for the fixtures and good-will. Patullo was not prepared to pay the whole sum; he paid down 50*l.*; and it was arranged that till he paid the balance he should occupy the premises as tenant from year to year, at the rent and on the terms in the intended lease; and accordingly he entered and occupied. Subsequently, in September, 1855, Patullo became bankrupt; the defendant, Besset, was appointed his assignee. The plaintiff's case was, that Besset had elected to take to the premises as assignee of Patullo's interest; and he sued for three quarters rent accruing after such alleged election. The defendant's case was that he never had so elected, and that all the acts relied *upon as evidence of such an election were merely [*987 preliminary experiments as to the value of the premises, to enable him to decide how he would elect; but upon this, which was the substantial controversy, the evidence was entirely in favour of the plaintiff. In the course of the cause, however, the plaintiff, who was a witness on his own behalf, unexpectedly produced from his pocket a parchment, which purported to be a lease from him to Patullo, signed, sealed, and delivered by the plaintiff. His statement as to this was, that, when the agreement to let Patullo into possession was come to, the lease had been

drawn up, and that it was signed, sealed, and delivered, but that he was to keep it till the balance of the 100*l.* was paid. No third person was present; and the plaintiff, who seemed to be under the impression that the absence of an attesting witness rendered a deed inoperative, stated that he delivered the deed, but that it was not attested. The objection was taken that, Patullo having an interest under a lease under seal, no action against his assignee for use and occupation would lie, the remedy being in covenant.

The learned Judge directed a verdict for the defendant, with leave to move to enter a verdict for the plaintiff, if the Court should be of opinion that the evidence would warrant the jury in finding such a verdict.

Mellor, in this term, obtained a rule Nisi accordingly.

Petersdorff now showed cause.—Assuming that the Court draws the inference of fact that the defendant has become possessed of Patullo's interest, and therefore is liable to pay the rent, the action is misconceived. The action for use and occupation is given by stat. 11 G. 2, c. 19, s. 14, in cases where the demise is not by deed, and in
*988] those only. Where the demise is by deed, the action must be debt for rent or covenant, whether it be against the original lessee or the assignee of his interest: Now here the lease to Patullo was executed and delivered; and Patullo entered under its terms. It is true that the lease was retained by the plaintiff as a security for the payment of 50*l.* The legal effect of that probably was to make him equitable mortgagee of Patullo's term; but it could not prevent the deed from operating. There is no evidence of a delivery as an escrow; indeed, no third person being present, there could not well be such a delivery.

Mellor and *Beasley*, in support of the rule.—The fair inference from the facts is, that though the deed was sealed and delivered, it was agreed by both plaintiff and Patullo that it should not operate till the payment of the balance of 100*l.* [Lord CAMPBELL, C. J.—It was clearly agreed that the parchment should be retained by the plaintiff, who was to have a hold on that till the money was paid; but would that prevent the operation of the deed vesting the term in Patullo?] It would if it was so agreed at the time by both parties: Pym *v.* Campbell, ante, p. 370. That was an instrument not under seal; but the law is the same when there is a delivery of a deed on an agreement that it shall not operate; Murray *v.* Earl of Stair, 2 B. & C. 82 (E. C. L. R. vol. 9). [ERLE, J.—That was a delivery to a third person. Here the deed seems to have been delivered to the intended lessee Patullo.] The evidence is that of the plaintiff, who certainly stated
*989] expressly that he *executed and delivered the deed. It did not appear what he meant by that, though probably he used the ordinary form of words, that he delivered it as his act and deed. But it is clear that he never parted with the possession of the parchment, and

that Patullo never expected to get it; and that is much stronger evidence of the intention of two ignorant men than their words. In Bowker *v.* Burdekin, 11 M. & W. 128, 147,† Parke, B., says: "In this case the execution of the deed was proved in the ordinary form, and I take it now to be settled, though the law was otherwise in ancient times, as appears by Sheppard's Touchstone, p. 58, 59, that in order to constitute the delivery of a writing as an escrow, it is not necessary it should be done by express words, but you are to look at all the facts attending the execution,—to all that took place at the time, and to the result of the transaction; and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow."

Lord CAMPBELL, C. J.—That last authority removes a doubt on which we should otherwise have taken time to consider. I think that, looking at all the facts here, it must have been the intention of both parties that the instrument should not operate as a lease till the money was paid, and that neither party intended that the interest in the term should vest till then. The formality of delivering the instrument to a third person as an escrow was not essential when it was intended to operate as such. Therefore Patullo himself could never have been *sued in covenant on that deed; he was only tenant from year to year, under the terms on which if the deed had operated he would have been tenant for years. Then there is ample evidence that the defendant took Patullo's interest whatever it was; and, as Patullo himself might have been sued in use and occupation, the technical objection, which at one time seemed most formidable, is obviated. [*990

COLERIDGE, J.—I agree. If Patullo was not in as lessee under the demise by deed, this action may be maintained against the defendant as his assignee. Now Patullo was, it appears, admitted to hold the premises as tenant from year to year, on the terms contained in the deed; but he never was in under the deed so as to be liable to be sued on the covenants in it. The detention of the parchment by the plaintiff in itself is a fact very significant of what their intention was: but, when that is coupled with the express agreement that Patullo should not be tenant for the term of years till he paid the money, it is clear what was meant.

WIGHTMAN, J.—The evidence was that the defendant took possession of these premises as assignee of the bankrupt Patullo; and there was ample evidence to warrant the conclusion that he elected to take the interest of Patullo in the tenancy. The difficulty was that there was what was, in form at least, a deed under the plaintiff's seal, demising the premises to Patullo for a term of years; and, if Patullo held under a demise by deed, the action ought to have been in covenant. Then the question comes to be whether the evidence was such as would justify

*991] a jury in inferring that Patullo did not *hold under the deed. Now the evidence is that the deed was executed in due form: and therefore the question is whether the jury would be warranted in inferring that at the time of the execution it was intended by both parties that it should not pass any present interest; for if it passed any interesse termini the entry by Patullo would preclude all objections to an action in covenant. But there was evidence enough that, by the understanding of both parties at the time, the execution was not to take effect till the remainder of the 100*l.* had been paid, and that the instrument was left in the custody of the plaintiff, not merely as detaining the parchment, but as evidencing the intention of the parties that the term was not to begin till that payment was made. There were circumstances showing that such was the intention: and the passage cited from the judgment of Parke, B., in Bowker *v.* Burdekin, 11 M. & W. 147,† shows that the question is, not what the words were, but what was the intention at the time.

ERLE, J.—I also think that the action lies. The defendant is in the position of Patullo, whose interest has vested in him. Could use and occupation have been maintained against Patullo? There was an agreement that he should have a lease by deed for forty years, provided he paid down 100*l.*; and, he having only paid 50*l.*, he was let into possession as tenant from year to year, on the terms of the lease, till he should pay the residue and entitle himself to the term. Then, says the defendant, that is all true, but a deed was engrossed on parchment and sealed, the plaintiff signed it, and used the words "I deliver this as my

*992] act and *deed." Now I am of opinion that, if it was at the time agreed between the parties that, though these words were used, the deed should not operate, it would not operate. There was evidence here, from which I draw the conclusion that it was not intended to operate; and therefore I conclude that the deed was never so delivered as to operate, and therefore that use and occupation well lies.

Lord CAMPBELL, C. J.—I wish to say, in case I have not expressed it before, that I should attach no weight whatever to what the grantor might think or intend when he delivered the instrument, unless I thought that it was intended and agreed by both parties that the delivery should operate only as the delivery of an escrow.

Rule absolute.

The QUEEN *v.* CHARLES EYRE. *Nov.* 19.

On an appeal against a poor-rate, the respondents at the next Session required the appellant to prove notice of appeal to the proper parties, under stat. 41 G. 3, c. 23; the appellant having failed to do so, the Sessions made an order dismissing the appeal, with costs.

Held, that the Sessions had no discretion, but were bound to enter and respite the appeal. The order dismissing it was quashed, as made without jurisdiction; and a rule to enter continuances and hear the said appeal upon the merits was made absolute.

DOWDESWELL, in this term, obtained a rule calling on the prosecutors to show cause why an order of Sessions, made on the appeal of Charles Eyre against a rate for the relief of the poor of the parish of Dedham, in the county of Essex, should not be quashed; and why the keepers of the peace and justices in and for the county of Essex should not enter continuances upon the said appeal, and hear and determine the same.

*The order, which had been brought up on certiorari, was in the following terms. [*993

Essex. Be it remembered that, at the General Quarter Sessions of the Peace, &c., "application and complaint being made to this court by the Rev. Charles Eyre, Clerk, in person, setting forth that he is aggrieved by a certain rate or assessment made for the relief of the poor of the parish of Dedham, in the said county, on," &c., "and therefore appealing against the same, and counsel appearing for and on behalf of the Churchwardens and Overseers of the Poor of the said parish of Dedham in support of the said rate; and it appearing that proper notices have not been given by the said appellant: This court doth dismiss the said appeal; and it is hereby ordered to be dismissed accordingly. And it is further ordered by this court that the said Charles Eyre do pay to the Churchwardens and Overseers of the Poor of the said parish of Dedham the sum of 59*l.* 7*s.* 3*d.* for their costs occasioned by the said appeal."

From the affidavits, on both sides, it appeared that a vestry of the parish of Dedham had adopted the mode of rating small tenements, permitted by stat. 13 & 14 Vict. c. 99, and that the rate in question was made in that mode. The appellant contended that the adoption was void, and consequently the rate bad; and the object of his appeal was to raise that question. He had appealed, with a similar object, against a previous rate, and had, on that occasion, stated in his notice of appeal, as his objection, that two persons, whom he named, were improperly omitted. That notice was served on the churchwardens and overseers, and also on the two persons named; but the Sessions dismissed the appeal because the notice did not specify, and was not served *on, all the persons who would be affected by the alteration; [*994 which they thought necessary. Subsequently the present rate was made, on 10th April, 1856. At the next Session, after his present

appeal, viz. those holden in July, Mr. Eyre entered his appeal, and appeared in person. The counsel for the respondents required him to prove his notice of the appeal. To obviate the objection which had been held fatal to his former notice, the appellant had, on this occasion, addressed the notice to each of the persons named in a schedule, which was apparently a copy of the rate book of the parish, and contained the names of the owners and occupiers of 434 tenements. The notice objected to the rate in very wide terms, because those persons were not rated when they ought to be rated, and were rated when they ought not to be rated, and were rated too high and rated too low. The appellant having failed to prove service of the notice on all those named, the Sessions, for want of proof of the notice, and no other reason, dismissed the appeal with costs.

T. Chambers now showed cause.—Stat. 41 G. 3, c. 23, s. 6, requires that, "if any person or persons shall appeal against any rate or assessment made for the relief of the poor, because any other person or persons is or are rated or assessed in such rate or assessment, or is or are omitted to be rated or assessed therein, or because any other person or persons is or are rated or assessed in any such rate or assessment at any greater or less sum or sums of money than the sum or sums at which he, she, or they ought to be rated or assessed therein, or for any other cause that may require any alteration to *be made in such rate or assessment with respect to any other person or persons, then and in every such case the person or persons so appealing for the causes aforesaid, or any of them, shall give such notice of appeal, in writing, as hereinbefore mentioned, not only to the churchwardens or overseers of the poor, or any two or more of them, but also to the other person or persons so interested or concerned in the event of such appeal as aforesaid; and such other person or persons shall, if he, she, or they shall so desire, be heard upon the said appeal; and it shall be lawful for the Court of General Quarter Sessions of the Peace, on the hearing of such appeal, to order the name or names of such other person or persons to be inserted in such rate or assessment, and him, her, or them to be therein rated and assessed at any sum or sums of money, or to order the name or names of such other person or persons to be struck out of such rate or assessment, or the sum or sums at which he, she, or they is or are rated or assessed therein, to be altered, in such manner as the said Court shall think right; and the proper officer of the said Court shall forthwith add to or alter the rate or assessment accordingly." Before this enactment it was not necessary to give notice to any one but the officers of the poor, under stat. 17 G. 2, c. 38, s. 4. The appellant, in the present case, has not given notice to the persons whose names are, if he succeeds in his appeal, to be added to the rate. [Lord CAMPBELL, C. J.—But, though he could not then try the appeal, might it not be entered and respited?] It would have been cruel to the

*995]

appellant to do so, as it is impossible that he should ever prove notice to all these parties; and it would be very hard on the parish officers who have come prepared to try *the appeal. [COLERIDGE, J.— I think it has been considered that, in cases under stat. 17 G. 2, c. 38, the Sessions have no discretion, but are bound to enter and respite the appeal.] It has been so considered; but this is a different statute; and the Sessions have, in general, discretion as to whether they will adjourn or not. [*996

Dowdeswell, contrà.—The appellant had, on a former occasion, given a notice of appeal which was good enough: but the Sessions, on the objection of the respondents, decided, erroneously, that it ought to name every person who was said to be omitted. Instead of contesting this decision the appellant yielded to it, and gave a notice complying with what was required. The present objection is therefore not very gracious; but it must be admitted that he is bound by stat. 41 G. 3, c. 23, to prove notice to every one whom he has named, before he can try the appeal. But the Sessions had no jurisdiction to dismiss his appeal because he had not proved notice. They were bound to enter and respite it. Stat. 9 G. 1, c. 7, as to appeals against orders of removal, enacts, in sect. 8, that, if it shall appear to the justices, to whom the appeal is given, "that reasonable time of notice was not given, then they shall adjourn the said appeal to the next Quarter Sessions, and there and then finally hear and determine the same." This enactment is imperative; and it makes no difference whether there has been no notice at all, or a notice not in reasonable time; Regina *v.* Justices of London, 9 Q. B. 41 (E. C. L. R. vol. 58). Stat. 17 G. 2, c. 38, gives an appeal against poor-rates. By sect. 4 the person aggrieved by a poor-rate may, "giving reasonable notice" to the officers of the poor, *appeal to the next General or Quarter Sessions, who are authorized and required "to receive such appeal, and to hear and finally determine the same; but if it shall appear to the said justices, that reasonable notice was not given, then they shall adjourn the said appeal to the next Quarter Sessions, and then and there finally hear and determine the same." These words are nearly the same as those in stat. 9 G. 1, c. 7, s. 8, which is in pari materiâ; and they also are therefore imperative. Stat. 41 G. 3, c. 23, commences by reciting stat. 17 G. 2, c. 38, s. 6. It then gives powers to amend the rate, which were not previously given to the justices. By sect. 4 it requires that notices of appeal against rates (alluding to the notice to the officers of the poor, required by stat. 17 G. 2, c. 38, s. 4) shall be in writing, and shall state the grounds of appeal; and by sect. 6 it requires that, if the ground of appeal be the insertion or omission of any person other than the appellant, "such notice of appeal, in writing," shall be given to those persons as well as to the officers of the poor. There is no express provision as to what is to be the effect of the want of notice: but it is [*997

obviously the intention of the Legislature to incorporate the provision of stat. 17 G. 2, c. 38, s. 4. If those are incorporated, the Sessions had no jurisdiction to dismiss the appeal; for they were bound to adjourn it.

Lord CAMPBELL, C. J.—We cannot now inquire into the merits. The sole question for us is, Whether the Sessions could dismiss the appeal? or, Whether, though there was no notice, they were bound to adjourn it? I am of opinion that they are so bound. It has long been *998] settled that the enactments in stat. 9 G. 1, c. 7, s. 8, and *17 G. 2, c. 38, s. 4, are obligatory, and that, though no notice at all has been given, the Sessions must adjourn the appeal. If this had been res integra, I should have hesitated before I so construed the statute; for I think it would have been better if a discretion had been intrusted to the Sessions: but the contrary is now settled. Then stat. 41 G. 3, c. 23, seems to me to have the effect of putting the party interested in the same situation as the officers of the poor. They may be respondents as well as the officers of the poor; and the same notice is to be given to them. Then, no notice being given to them, the Sessions must act as if no notice was given to the officers of the poor. They were not at liberty to dismiss the appeal, but were bound to adjourn it to the next Sessions, and then to hear it.

COLERIDGE, J.—I am of the same opinion. It is only by reading the two Acts, 17 G. 2, c. 38, and 41 G. 3, c. 23, as forming one Act, that we can avoid absurdity. It cannot be disputed that stat. 41 G. 3, c. 23, does not repeal stat. 17 G. 2, c. 38. Now by stat. 41 G. 3, c. 23, the same notice, which, by the earlier Act, must be given to the officers of the poor, must be in writing and also given to the parties. If there is no such notice the Sessions have no discretion; they must respite the appeal under stat. 17 G. 2, c. 38; it would be absurd and inconsistent if, at the same time, they had discretion to dismiss it because this same notice was required by stat. 41 G. 3, c. 23. To avoid this inconsistency we must read the two Acts together.

WIGHTMAN, J.—I agree that the two Acts must be read together, *999] and that the provisions as to insufficient *notices contained in the earlier Act apply to the same notices if insufficient under the later one.

ERLE, J.—The case must be governed by the two Acts, exactly as if stat. 41 G. 3, c. 23, in terms incorporated stat. 17 G. 2, c. 38.

Rule absolute.(*a*)

(*a*) See Regina *v.* Eyre (April 29th, 1857), 7 E. & B.

The QUEEN *v.* WILLIAM KERSHAW. *Nov.* 19.

The occupiers of property in a parish in respect of which they are liable to be rated to the highway-rate are entitled, under stat. 5 & 6 W. 4, c. 50, s. 6, to vote at the election of surveyors; though they are not actually rated to the last highway rate.

On appeal against the appointment or election of surveyors of the highways for the hamlet of Alverthorpe, in the West Riding of Yorkshire, the appeal was dismissed, subject to the following case.

Alverthorpe is a hamlet united with the hamlet of Thornes for the maintenance of the poor; and the two hamlets have one entire poor-rate. The nomination of overseers of the poor for the joint hamlets takes place at Alverthorpe in one year, and at Thornes in the succeeding year. In March, 1856, the nomination of overseers of the poor took place at Thornes. Each hamlet maintains its own highways, levying a distinct rate for that purpose. Each hamlet also elects its own highway surveyors. There was no nomination of overseers of the poor at Alverthorpe for the year 1856. Previous to the 25th March, 1856, a notice was given convening a meeting of the inhabitants of Alverthorpe, on the said 25th day of March, to elect highway surveyors; and on that day a great number of inhabitants met in the vestry, and the perpetual curate of Alverthorpe was *duly elected chairman [*1000
of the said meeting. It was then proposed and carried that the meeting should be adjourned to the school room of the said hamlet of Alverthorpe. The meeting of inhabitants accordingly adjourned to the room. William Kershaw and Robert Adams were then proposed and seconded, as and for the surveyors of the said highways, on one side, and Mark Harrap and William Teale were proposed and seconded, on the other side. On a show of hands the election was declared in favour of Kershaw and Adams. A poll was demanded and granted for Harrap and Teale. The chairman of the meeting was then requested by both parties to take the poll, and was requested on the part of Kershaw and Adams not to receive the votes of persons who were not rated in the last highway-rate for the hamlet of Alverthorpe, which was made on the 4th June, 1855. The chairman said he should allow all inhabitants of Alverthorpe to vote who were included in the last poor-rate, which poor-rate was made on the 28th January, 1856, and should take the poor-rate for his guide. Accordingly all the persons who voted at such election were persons rated to the relief of the poor; and many such persons tendered their votes for and were permitted to vote for Kershaw and Adams; Kershaw himself being of the number. No evidence was given that any persons whose names were not in the said poor-rate tendered their votes for Kershaw and Adams. A considerable number were not rated to the last highway-rate of 4th June, 1855; but all those voters who were rated to the highway rate were also rated in the poor-rate. Amongst those who voted were several persons who

were within the limits of the borough of Wakefield, a part of the hamlet of Alverthorpe being within the *borough of Wakefield and the district of the Local Board of Health to which, in the said borough of Wakefield, The Public Health Act, 1848, has been applied. Some of such last-mentioned persons voted for Kershaw and Adams, and some for Harrap and Teale. At the conclusion of the poll Harrap and Teale had a majority; and the chairman declared the same, and that Harrap and Teale were duly elected. On an appeal against their election, it was contended for the appellant that the poll was invalid because no person ought to have been permitted to vote at the election who was not actually rated to the said highway-rate of 4th June, 1855; and sect. 5 of stat. 5 & 6 W. 4, c. 50, was relied upon as explaining that the word "Inhabitant," in sect. 6, means a person rated to the highway-rate. On the other hand it was contended by the respondents that under the provisions of stat. 5 & 6 W. 4, c. 50, all persons inhabiting the said hamlet of Alverthorpe, assessed to or liable to contribute to the poor-rate for the united hamlets of Alverthorpe and Thornes, were duly qualified to vote in the election of surveyors of the highways for the hamlet of Alverthorpe. The Court of general Quarter Sessions held that the poor-rate book was properly acted upon by the chairman in the reception of votes at the election, and therefore dismissed the appeal. The court found, as a matter of fact, that the appellants had protested against the poor-rate book being used for the purpose of taking the names of the persons entitled to vote at the election, and that, as a matter of fact, they did not acquiesce in the use of such book for such purpose. The counsel for the respondents submitted, as a matter of law, that the appellants, by not withdrawing from the election but going on to poll *their votes according to the poor-rate book, and taking their chance of the result of the poll being favourable to themselves, were estopped from afterwards objecting to the legality of such mode of proceeding.

*1001]

*1002]

If the Court of Queen's Bench should be of opinion that the persons rated in the poor-rate book were legally entitled to vote at such election, taking into account the circumstances before detailed, then the judgment of the Court of general Quarter Sessions is to be confirmed; otherwise the election of Harrap and Teale is to be quashed.

On the case being now argued this Court expressed much doubt as to whether the case ought not to be restated, as the facts were not clear. Ultimately however this Court understood the Sessions to mean to state that the chairman of the meeting had received the votes of persons possessed of property, in respect of which they were liable to be rated to the highway-rates of Alverthorpe, whether actually rated to the last highway-rate or not, some of whom were resident in Wakefield; and that he had used the poor-rate as evidence to assist him in determining whether the persons tendering their votes were possessed of

such property; and that the votes of persons, not rated to the highway-rate but liable to be rated, turned the scale at the election: and that the question of law, intended to be put to this Court, was whether persons liable to be rated but not actually rated were entitled to vote. Only those parts of the argument bearing upon this hypothesis of fact, and upon the assumed question of law arising therefrom, are reported.

Pickering and *A. J. Johnston*, in support of the judgment of Sessions.—The General Highway Act (5 & 6 *W. 4, c. 50), sect. 6, enacts that "the inhabitants of every parish maintaining its own highways, at their first meeting in vestry for the nomination of overseers of the poor in every year, shall proceed to the election" of surveyors. "Provided always, that in any parish where there is no meeting in the year for the nomination of overseers of the poor, the inhabitants contributing to the highway-rate shall meet" on 25th March to elect surveyors. By sect. 27 a highway-rate is to be assessed by the surveyor on all property liable to be rated to the relief of the poor; which is to extend to such woods, mines, quarries, and other hereditaments as have heretofore been usually rated to the highways. So that every person liable to the poor-rate is also liable to be rated to the highway-rate by the surveyor. There may be persons liable to the highway-rate who are not liable to the poor-rate; but it is not asserted that the votes of any such persons were rejected. The question therefore is whether persons rateable but not actually rated to the highway-rate are inhabitants entitled to vote. The general policy is to give the franchise to those liable to contribute. The occupiers of land, whether resident or not, are inhabitants and parishioners, and as such may vote; Jeffrey's Case, 5 Rep. 66 a, 67 b. Sect. 5 of The General Highway Act gives an extended meaning to several words, and, amongst others, to "inhabitant," which shall be understood "to include any person rated to the highway-rate." It does not here appear that the vote of any such person was rejected. [*1003

R. Hall, contrà.—The franchise is, by sect. 6, given to "inhabitants," which word, by sect. 5, includes those *rated to the highway-rate: and it is those "contributing" to the highway-rate, not those who shall be liable to contribute, that are directed to meet; sect. 6. [ERLE, J.—That construction would seem to exclude those who being rated, have paid their rates; they are not contributing, though they have contributed.] [*1004

Lord CAMPBELL, C. J.—The point made at the election seems to have been, that no person had a right to vote unless actually rated to the highway-rate; and the poor-rate seems to have been used, not as conclusive that the parties named in it had a right to vote, but as evidence that, though not rated to the highway-rate, the persons in question were occupiers of property in respect of which they were liable to be rated; and the question of law submitted to us I understand to be,

whether such persons had a right to vote. I am of opinion that under stat. 5 & 6 W. 4, c. 50, a person occupying property, in respect of which he is liable to contribute to the highway-rate, is entitled to vote, whether actually rated or not. If there were no interpretation clause this seems clear; for, by sect. 6, "the inhabitants of every parish maintaining its own highways, at their first meeting in vestry for the nomination of overseers of the poor in every year," shall elect the surveyor. What would "inhabitant" mean, when so used, if this sentence stood alone? Him who has property in respect of which he is liable to be assessed to contribute to highways. The inhabitant of a parish, in reference to a parochial tax, is the person having property in respect of which he is liable to that tax. When we look on further this construction is strengthened. It can hardly be supposed that when there is no such meeting the election is to be by a different *class of voters: but the proviso is, that in such a case "the inhabitants contributing to the highway-rate shall meet" and elect the surveyors. I think that word "contributing" does not mean only those who have contributed or already are assessed to a rate already made, but includes all who are liable to be assessed to a rate if one were now made; and this is a reasonable construction; for it is important to those who are so liable that there should be a proper person to be surveyor, as he will have the power to assess them to the next rate, whether heretofore they have been assessed or not. I think, therefore, that not only those rated but those rateable were entitled to vote: and, that being, as I conceive, the point really in dispute, the judgment should be affirmed.

*1005]

COLERIDGE, J.—It is distressing to have to answer a case without having a distinct statement of the question. I am prepared to give an opinion as to what is the construction of the Act; but I do not really know how the Sessions ought to have acted, or what it is they ask of us. If they mean to ask if the being on the poor-rate was a test of the qualification to vote, I answer certainly not. If they only say that it was used as evidence that the persons voting were possessed of rateable property, and ask if such persons, though not rated to the highway-rate, were entitled to vote, I answer, Yes. If we look at sects. 5 and 6, we find that the qualification depends on the highway-rate alone, and that the doubt is if the Act means to entitle a person to vote only if actually on a highway-rate, or if it be enough that he is occupier of property subjecting him to be rated. After some doubt, I think it means the latter. When you speak of rate-payers as a class, *you do not speak with reference to those paying a particular rate, but to those paying rates generally; and in this case I think that "inhabitants contributing to the highway-rate" means the class of highway-rate payers. It is not suggested that any person of this class has been excluded; and the poor-rate gave reasonable primâ facie evidence that those on it were within that class.

*1006]

WIGHTMAN, J.—The judgment of the Sessions is to be confirmed "if the Court of Queen's Bench should be of opinion that the persons rated in the poor-rate book were legally entitled to vote at such election, taking into account the circumstances before detailed." Looking at the case for those circumstances, we find that the chairman at the meeting was requested, on behalf of the appellant, "not to receive the votes of persons who were not rated in the last highway-rate;" and at Sessions his contest was that "inhabitant" "means a person rated to the highway-rate." So I think it sufficiently appears that the real dispute is, whether the voter must be actually assessed to the highway-rate, or if it is enough that he is liable to be assessed. I have great difficulty in saying that in this Act "inhabitant" means a person not actually rated; for the interpretation clause, sect. 5, says that the word "inhabitant" shall be understood "to include any person rated to the highway-rate." That, it is true, may mean to include such persons in addition to others, and not to exclude those not rated. Some weight may be given to the latter part of sect. 6, as showing that the inhabitants are not only to be those rated, but those contributing to the rate; but I have had much difficulty in holding that this word *means liable [*1007
to any such rate. It may, however, mean that; and, as that meaning is no doubt reasonable, I agree with the rest of the Court that the judgment should be affirmed.

ERLE, J.—I think the judgment right on the question of law, which I take to be, Whether the occupiers of property in respect of which they were liable to be rated to the highway-rate, but who were not actually rated, were entitled to vote. This being an election in a year when there was no annual meeting for the appointment of overseers, the case falls within the latter part of sect. 6; and there the description is "inhabitants contribut*ing* to the highway-rate:" and it is said that no inhabitant falls within this description unless he has contribute*d* to the last rate made. But it seems to me that he who will contribute to the next rate is as much within the present tense "contributing" as he who has contributed to the last. It seems to me a definition of a class, and that the circumstance of his being rated or not to the last rate is excluded from the definition altogether. I have looked with some attention to the point, which weighs so much with my brother Wightman, arising on the interpretation clause. If the section had said "inhabitant" shall mean one rated and no other, it would have been decisive; but I think the word "include" is used, throughout the section, by way of extension; as "'church' shall be understood to include chapel;" and that when it is intended to make an excluding definition the phrase is altered; as "Petty Sessions" shall be understood "*to mean* the petty session or petty sessions held for the division or place." There is the more reason for adopting this construction, as the qualifi-

*1008] cation, that the voters shall be rateable and *actually rated and paying rates, is common in Acts, and there is no difficulty in expressing it. No words of that kind are to be found here. Therefore, on the point of law, I think the judgment right.

Judgment affirmed.

The QUEEN *v.* The SOUTHWARK and VAUXHALL Water Company. *Nov.* 19.

A water company were occupants of pipes under the surface of the soil in a parish in which the provisions of The General Lighting Act (3 & 4 W. 4, c. 90) had been adopted. The parish was within the Metropolitan district. In a lighting rate imposed under The Metropolitan Local Management Act, the Company were rated as coming within the description in sect. 165 of occupants of "houses, buildings, and property, other than land," at a rate three times greater than that at which the occupiers of land were rated.

Held, that they were rateable at the lower rate, as occupiers of land.

On appeal by The Southwark and Vauxhall Water Company against a lighting rate, made by the parish officers of St. Mary, Putney, in pursuance of an order issued by the vestry and district board of works under the provisions of the 158th and following sections of stat. 18 & 19 Vict. c. 120 (The Metropolis Local Management Act), the Court of Quarter Sessions confirmed the rate, subject to the opinion of this Court upon the following case.

The appellants are constituted under stat. 8 & 9 Vict. c. lxix.,(*a*) which united the Southwark Water Company and the Vauxhall Water Works Company into one corporation, to be called The Southwark and Vauxhall Water Company. (It is agreed that this Act of Parliament and the other Acts mentioned in this case shall be taken as part thereof.)

*1009] In pursuance of the *requirements of The Metropolis Water Act, 1852,(*b*) and the powers of The Southwark and Vauxhall Water Act, 1852,(*c*) the appellants have constructed extensive works at Hampton on the banks of the Thames, whence they take their present supply. The water is pumped from Hampton through a conduit main to the Company's works at Battersea, where it is filtered; and, when filtered, it is distributed to various localities by means of supply mains and pipes radiating from Battersea. The conduit main passes through the parish of Putney; and the Company also supply water in that parish. The conduit main, the supply mains, and the supply pipes in the parish of Putney, are all laid under the soil of the public roads and streets. The Company have no works in the parish; nor are they owners of any land, buildings, or property therein except the above-

(*a*) Local and personal, public. "For uniting the Vauxhall and Southwark Water Companies into one company, to be called The Southwark and Vauxhall Water Company, and for extending the works of the said Company."

(*b*) 15 & 16 Vict. c. 84.

(*c*) 15 & 16 Vict. c. clviii., local and personal, public.

mentioned mains and pipes. The parish of Putney, prior to the passing of stat. 18 & 19 Vict. c. 120 (The Metropolis Local Management Act), was lighted under the provisions of stat. 3 & 4 W. 4, c. 90 (The General Lighting Act): but it is now lighted under the Metropolis Local Management Act. Stat. 18 & 19 Vict. c. 120, s. 165, provides: "That in every parish or part of a parish in which, at the time of the passing of this Act," the General Lighting Act "is in force, the owners and occupiers of houses, buildings, and property, other than land, shall be rated to every lighting rate made under this Act at a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated in such lighting rate; and in every parish or part of a parish in which, under any other Act, land is now rated, in respect of *expenses of lighting, at a less amount, in proportion to the annual value thereof, than houses, or is now wholly [*1010 exempted from being rated in respect of such expenses, such land shall continue to be rated to every lighting rate made under this Act, at such less amount, or, where such land is now wholly exempted as aforesaid, shall be wholly exempted from such rate." The rate which is the subject of the present appeal was a rate and assessment on houses, buildings, and property other than land at the rate of 1s. in the pound, and upon land at the rate of four pence in the pound. The appellants were rated and assessed for their property aforesaid at 1s. in the pound: and they appealed, upon the ground that they were occupiers of land only within the meaning of the 165th section of the Metropolis Local Management Act," and, consequently, liable to be rated at four pence only instead of 1s. in the pound. The questions for the opinion of the Court are:

1st. Whether the appellants are liable to be rated to lighting rates made under The Metropolis Local Management Act as owners of land, or as owners and occupiers of houses, buildings, and property other than land.

If the appellants are liable to be rated for the whole or any part of their said property at the lower amount, the above rate is to be quashed.

If they are liable to be rated for the whole of their said property at the higher amount, the rate is to be confirmed.

Knapp and *O'Connell*, in support of the rate.(*a*)—*The question depends on the construction of stat. 18 & 19 Vict. c. 120. [*1011 By sect. 161 property is to be rated as in the poor-rate. No doubt the occupiers of pipes are occupiers of land, and, as such, rateable to the poor; Regina *v.* East London Waterworks Company, 18 Q. B. 705 (E. C. L. R. vol. 83). But sect. 165, under certain circumstances, puts a higher rate on "houses, buildings, and property, other than land." In

(*a*) Before Lord Campbell, C. J., Coleridge, Wightman, and Erle, Js. The argument was not completed on this day, but was resumed on November 20 and November 21, before the same Judges.

its extended sense the word land includes all real property; so that, strictly speaking, the occupier of a house occupies land; in this section it must be used in a more restricted sense. That sense must be that of land occupied for agricultural purposes, as distinguished from land occupied as a site for a house, building, or other similar property, in which must be included pipes. In Regina *v.* Midland Railway Company, 4 E. & B. 958 (E. C. L. R. vol. 82), a local lighting Act imposed a lighting rate on the occupiers of all "houses, counting-houses, brewhouses, and all buildings, erections, works, and tenements and hereditaments, except as thereinafter mentioned." The exception was that occupiers of houses under 5*l.* should not be charged; "nor should any person be charged with or rated in or by any such rates or assessments for or on account of any land whatsoever." The question was, whether the Company were rateable as occupiers of the line of railway, which depended upon whether it was land or not. The Court, in giving judgment, say: "Reading the two clauses together, as comprehending all real property, we think that the exemption extends only to land used for the purposes of agriculture, or gardening, or any kind of mere vegetation, together with the roads and other matters that are ancillary to those purposes; *and that hereditaments in which capital has been invested for habitation, or for purposes of profit, from manufacturing or mechanical industry, are to be rated. According to this construction, the line of a railway is liable." And, by the same reasoning, the land occupied by pipes would, under that Act, have been liable, and under this are liable to the higher rate. [ERLE, J.—The Court has rather gone on the supposition that the Legislature, in such Acts, meant to distinguish between urban property, being that which is the most benefited by the purposes for which the rate is to be raised, and rural property, being that which is less benefited. What species of property is less benefited by lighting than pipes three feet under ground?] They are accessories to the habitations; they would be of no value unless the houses were inhabited. [ERLE, J.—The vegetables in the market garden are consumed in the town just as the water is; and the value of the garden is enhanced by increased habitation in the same way as that of the pipe; yet the garden is rural.] The idea of the Legislature as to what was rural appears by sect. 163, where they impose a lower sewer rate on "all land used as arable, meadow, or pasture ground only, or as woodland, orchard, market garden, hop, herb, flower, fruit, or nursery ground." The pipes are not land; Chelsea Waterworks Company *v.* Bowley, 17 Q. B. 358 (E. C. L. R. vol. 79).

Garth, contrà, was stopped by the Court.

Lord CAMPBELL, C. J.—I think this is a very clear case. We are called upon to say, Whether the appellants are liable to be rated to *lighting rates under the *Metropolis Local Management Act as owners of land or as owners and occupiers of houses, build-

ings, and property other than land? I think the object of the Legislature in making the distinction between different descriptions of property, was that the higher rate should be thrown on the class of property which derives superior benefit from lighting, and the lower rate on the class which derives less benefit. That is the key to the interpretation of the Act. It is not possible to contend that this species of property derives much benefit from lighting; though the parish of Putney were to remain in perpetual darkness, the water would flow through these subterraneous pipes equally well. Then, are the words used sufficient to include this species of property? The owners and occupiers of "houses, buildings, and property, other than land, shall be rated to every lighting rate" thrice as high as "owners and occupiers of land." "Property" here evidently means property of the same sort as houses and buildings. But the appellants are not rated as being occupiers of pipes; they are rated as being occupiers of the land which they occupy by means of those pipes. They are rated in respect of land which cannot, in any sense, be said to be houses or buildings, or property of that sort. We derive no assistance from decisions on other acts. The land tax Acts were passed with quite different objects; the language in the Act construed in Regina *v.* Midland Railway Company, 4 E. & B. 958 (E. C. L. R. vol. 82), was very different.

COLERIDGE, J.—I am of the same opinion. It is sought to impose a higher rate on these parties than on *those who are occupiers of land. If that burthen is cast on them at all, it is by sect. 165. By an earlier section (163) land used in certain specified ways was to be assessed at a lower rate to sewer rates; and we are asked to infer that in this section, relating to lighting rates, land is to be restricted to land used in similar ways. But the argument from that provision makes the other way. The restrictions in sect. 163, being omitted in sect. 165, were probably intended to be omitted; and the reason why is apparent; sect. 165 is applicable only where the General Lighting Act had been adopted; and the intention was to preserve the exemptions already in force, without alteration. Then taking these words alone, and seeing that the appellants would be rateable only as occupiers of land, they are clearly not to be rated at the higher rate. [*1014

WIGHTMAN, J.—The sewer-rate and the highway-rate are distinct rates imposed in distinct sections. In sect. 165 the Legislature evidently contemplated the vested benefit which land in parishes, under the Lighting Act, had over houses. The rate is to be as the poor-rate. Pipes are not rateable per se, but only because the owner by them occupies land. So being an occupier of land, in such parishes he is liable to the lower rate. The section as to sewer-rates does not apply to lighting rates.

ERLE, J.—The appellants occupy land in which are pipes. They do this in a parish where there is, by statute, a higher lighting rate on

those who occupy houses, buildings and property other than land than on those who occupy land. And the question is, what does *land mean in this Act? Land generally includes all real property; but here it is used in the sense of land other than houses, buildings, and such property, as, being used for habitation, is most benefited by lighting. On such property a higher rate is imposed from which other land is exempt. In the case of a sewer-rate they have defined the exemption differently; and if the exemption from the lighting rate had been in the same terms our decision might have heen different. But pipes are not houses, or property of that kind. The mains are not connected with habitation within the parish, as the service pipes are; they are means ancillary to bringing the water from its source to the parishes in which it is to be used. Speaking for myself alone, I cannot think that the profit made by the use of the water in a different district should be taken into account at all in rating the occupiers of the land by the mains. Rate quashed.

*1015]

PALMER *v.* The JUSTICE ASSURANCE Society. *Nov.* 20.

Where judgment has been recovered against a joint stock company, a Judge of any Court sitting at Chambers has the same jurisdiction, under stat. 7 & 8 Vict. c. 110, s. 68, to order execution to issue against a shareholder as a judge of the Court in which judgment was obtained.

***Quære*, whether the Court have a discretion, under any circumstances, to suspend execution against an individual shareholder on account of the pending of proceedings under the Winding-up Acts?**

THE plaintiff signed judgment for 113*l.* 11*s.* 6*d.*, on 12th August, 1856, against this Society, which is a joint stock company, completely registered under stat. 7 & 8 Vict. c. 110. He issued execution against the Society, and seized their whole property, which *consisted of one iron safe with nothing in it. It was sold, and produced the net sum of 5*l.* 13*s.* 6*d.* On the 26th August he served notice on Francis Ford and Alfred Tilt, who were alleged to be shareholders in the Society, that, "upon expiration of ten days from the date of the service of this notice upon you, or as soon after the expiration thereof as conveniently may be, an application will be made to one of the Judges for a summons calling upon you to show cause why execution should not issue against you upon the said judgment until the same be satisfied, pursuant to the provisions of the said statute" (7 & 8 Vict. c. 110).

*1016]

A summons was accordingly taken out, and attended before Bramwell, B. Affidavits were used at Chambers on behalf of the plaintiffs. On those affidavits the facts above stated appeared. It was also deposed, by the secretary of the Society, that, on a day subsequent to the last return of the list of shareholders in December, 1855, Ford and Tilt

became jointly possessed of certain shares, and that, "in my presence, the said Francis Ford, for himself, and the said Alfred Tilt, his copartner, executed the deed of settlement of the said Society for the said shares, and that they thereby became shareholders. And I believe they were, at the time the above-named plaintiff obtained his judgment in this action on 12th August last, and still are, such shareholders in the said Society." Bramwell, B., referred the matter to the Court; it did not distinctly appear, either on the affidavits or by the statement of counsel, what passed before him, or on what grounds he made the reference.

Notice was given to Ford and Tilt that an application would be made to the Court for a rule to show cause why the plaintiff should have execution against them, *and why they should not pay the costs [*1017
of the application, and "also of the application made to Mr. Baron Bramwell for the same purpose in pursuance of the reference to the Court directed by the said Mr. Baron Bramwell, and upon which application to the Court the affidavits of," &c. (the affidavits used at Chambers), "copies of which have already been given you, will be used."

Piffard, in this term, obtained such a rule, drawn up on reading these affidavits and an affidavit of service of this latter notice.

Holl, on November 13th, showed cause.—The statute requires that the application should be made to a Judge of the same Court in which the judgment was obtained. Baron Bramwell is not a Judge of this Court; and the notice given to appear before him has been exhausted; Corder *v.* The Universal Gaslight Company, 6 Com. B. 190 (E. C. L. R. vol. 60). That decision was confirmed in the Exchequer; Edwards *v.* The Cameron's Railway Company, 15 Jurist, 470. Stat. 1 & 2 Vict. c. 45, s. 1, gives the Judges of each Court general jurisdiction to transact business for all the Courts; but stat. 7 & 8 Vict. c. 110, s. 68, which is subsequent in point of date, enacts that execution shall issue by leave of the Court or of a Judge of the Court in which judgment has been obtained. [ERLE, J.—The point does not seem to have been the ground of the decision either of the Common Pleas or of the Exchequer in the cases you cite. It seems to have been reported as the decision of Parke, B., at Chambers, and acquiesced in, or, at least, not *contradicted by the Judges in banc. Lord CAMPBELL, C. J. [*1018
—I see nothing to make it probable that the Legislature should, in this particular case, put a restriction on the authority of the Judge at Chambers. But for the two cases cited, I should have thought it clear that my brother Bramwell, sitting at Chambers, might do everything which a Judge of this Court could do when there. I have myself, when I have been Judge in town during the long vacation, always acted on the supposition that I had all the authority of a Judge of every Court to make orders in any Court.] Then there is not sufficient on

the affidavits to show that Tilt is a shareholder; his partner could not, as such, bind him by executing a deed. [WIGHTMAN, J.—You appear for Tilt, who, if he did not give due authority, might deny it and does not.] Lastly, there has been an order very recently made for winding up the Company. That being so, the Court, in its discretion, will not grant execution; Thompson *v.* Universal Salvage Company, 3 Exch. 310.† An official manager has not yet been appointed; nor is there, as yet, a possibility of making any affidavit as to what will be the effect. [Lord CAMPBELL, C. J.—If it could be made to appear that there is a reasonable prospect of the creditor being satisfied as speedily and thoroughly as by issuing execution, we should discharge the rule; and if it is not shown that serious damage would be done to the creditor by the delay we should enlarge the rule to ascertain how the facts are.]

Piffard, in support of his rule.—The Court of Exchequer, in this Term, decided that the pending of *proceedings under the Winding-up Act, did not take away the right of the creditor to execution; Hills *v.* London Assurance Company.(*a*) [Lord CAMPBELL, C. J.—We will take time to consider as to the first objection. In the mean time the rule will be enlarged for a week; at the end of which time both parties may file further affidavits. If on those it appears that there is a prospect of speedy satisfaction under the Winding-up Act, I, at least, shall, as at present advised, refuse leave to issue execution against a single shareholder.]

*1019]

On this day the case was mentioned again. *Holl* produced no affidavit. *Piffard* produced an affidavit that, on inquiry at the Chambers of Kindersley, V. C., the clerks stated that, from the state of the business, it would be at least two or three years before any moneys could be distributed for payment of the claims upon the Society.

Per CURIAM.(*b*)—The execution must go unless there be another remedy as speedy and effectual, or nearly so; which is not the case here. As to the other point: there is no decision binding this Court not to act upon its own opinion, which is that Bramwell, B., had the same powers to make this order as a Judge of this Court would have had. Rule absolute.(*c*)

(*a*) Since reported, 1 H. & N. 398.†

(*b*) Lord Campbell, C. J., Coleridge, Wightman, and Erle, Js.

(*c*) See Morisse *v.* The Royal British Bank, 1 C. B. N. S. 67 (E. C. L. R. vol. 87).

*GEORGE RUSSELL *v.* ANTHONY SNIDER PELLEGRINI. *Nov.* 21. [*1020

By an agreement in writing, a ship was chartered at a fixed sum per month. It was provided, that, "should any difference of opinion arise between the parties to this contract, either in principle or detail, the same" should be referred. The charterer claimed from the shipowner damages for an alleged breach of an implied warranty of seaworthiness, and desired to have this claim referred. The shipowner did not comply. Then the charterer commenced an action. The monthly hire having become due, the shipowner demanded it from the charterer, and, on his refusal, commenced an action against him. The ground of refusal was that the charterer desired to have all matters referred together whereby he would have the benefit of a set-off. On a rule obtained by the charterer to stay proceedings in the shipowner's action: Held (Wightman, J., dubitanto), that, though there was no dispute as to the subject-matter of the action itself, viz. the hire, which was admittedly due, the circumstances gave the Court jurisdiction under stat. 17 & 18 Vict. c. 125, s. 11. And the Court, being satisfied, notwithstanding the pendency of the cross action, that the charterer had always been desirous to refer all matters, and that the application was bonâ fide, and that justice would be done by staying the action, made the rule to stay proceedings absolute.

LUSH, on behalf of the defendant, in this Term, obtained a rule calling on the plaintiff to show cause why the proceedings in this action should not be stayed under sect. 11 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125).

From the affidavits on both sides it appeared that a charter-party, dated 8th February, 1856, had been signed by the plaintiff and defendant. It was expressed to be between "George Russell" (the plaintiff), "acting for and by authority of the managing owners of the good screw steam ship or vessel called the Butjadinger," of the one part, and "Messrs. A. Snider Pelligrini & Co." (the defendant), of the other part. By this agreement the ship was to be at the disposal of the defendant for three or four calendar months, at his option, to commence so soon as she should arrive at London from her then present voyage. The charterers were to pay "735*l.* per month, to commence on the day the vessel shall be placed at the disposal of the charterers, such payments to be made in cash monthly, at the expiration of each month. *The first month's hire, free of any interest or commission, to be paid in advance prior to the vessel leaving London." [*1021 The perils of the seas were excepted. The charter-party contained no express warranty of seaworthiness, and was not worded in the ordinary style, describing the vessel as "being tight, staunch, and strong, and in every way fitted for the voyage;" but there was nothing to exclude any warranty of seaworthiness implied by law. The instrument contained the following clause. "Should any difference of opinion arise between the parties to this contract, either in principle or detail, the same shall be referred for arbitration to two persons, one to be chosen by each contracting party, with power to call in a third person as referee, the decision of a majority of whom shall be final and binding."

The vessel was put at the disposal of Pellegrini. He despatched her to Antwerp to take on board a cargo; he paid the first month's hire,

735*l.*, as required, before the vessel left London; and she sailed. On her arrival at Antwerp she was in a leaky state, and could not take on board the cargo without repairs. On the 29th April, Pellegrini wrote to Russell claiming damages, on the ground that the vessel was not seaworthy when placed at his disposal, and requesting him to join in naming arbitrators to decide the difference. No answer was returned to this claim, or to a subsequent application from Pellegrini s solicitors pressing Russell to refer the dispute. On 23d May a writ was issued by Pellegrini against Russell, to which an appearance was entered, and a declaration, on a breach of warranty that the vessel was seaworthy at the time she was put at his disposal, was delivered. In September, Russell issued against Pellegrini the writ on which the present action

*1022] *was founded; and Pellegrini appeared. On 15th September, Russell served on Pellegrini a demand of three months' hire of the ship, with a notice requiring payment, and took proceedings under the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), sect. 78, calling on him to appear in the Court of Bankruptcy. On the 21st October, Pellegrini did appear: the proceedings were adjourned until finally, on the 4th November, an order was made that Pellegrini should give security. In the mean time, Pellegrini having changed his solicitors, the new solicitors, on 22d October, wrote to Russell's attorney the following letter. "Russell *v.* Pellegrini. We have come into this cause as the attorneys of Mr. Pellegrini; and the order to change will be served upon you to-morrow. You are aware that it is stipulated in the charter-party that, if any difference of opinion between the parties should arise, either in principle or detail, the same shall be referred to arbitration in the usual way. Differences have arisen. Your client claims to be paid the hire of the vessel. We object to pay it on principle, because the vessel was not what she was represented to be, and was not maintained in an efficient state; we claim damages from your client for several breaches of the charter-party. Your client denies those breaches. It seems to us therefore that the matter in difference ought to be referred according to the stipulations of the charter-party: and we now require you to name an arbitrator on the part of Mr. Russell. We are prepared to name one on the part of Mr. Pellegrini. If you shall make default in naming your arbitrator within forty-eight hours, we shall apply to a Judge at Chambers for an order to compel the reference and to stay the action in the mean time." Russell not

*1023] having *appointed an arbitrator, a summons was taken out to stay the proceedings, which was heard before Crompton, J., who made no order. Pellegrini deposed that he always was ready to refer the whole.

Joseph Brown now showed cause.—The Court are called upon, for the first time, to exercise the jurisdiction given them by The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), sect. 11. By that

section, whenever the parties to an instrument in writing have agreed "that any then existing or future differences between them shall be referred to arbitration, and any one or more of the parties so agreeing" "shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them," "in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the Court in which action or suit is brought, or a Judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such Court or Judge may seem fit." Now here the plaintiff's claim in the present action is not one of the matters agreed to be referred; for, as to it, there is no bonâ fide dispute at all. Supposing that there is an implied warranty of seaworthiness, *and that it has been broken (both of which [*1024 are denied), still the defendant has no defence to this action for payment of the monthly hire of the vessel which he has had in his service. What he seeks is, by this process, to obtain time for paying the hire now overdue, or perhaps to obtain the benefit of a set-off which the law does not give him. The Court of Common Pleas, in the exercise of their discretion, refused to order a reference where the effect would be to alter the distribution of assets in bankruptcy; Pennell *v.* Walker, 18 Com. B. 651 (E. C. L. R. vol. 83). And, even supposing that the Court could stay this action, in which there is no matter in difference on account of a right of cross action, the defendant has, by suing in that other action, waived his right to have a reference.

Lush, in support of his rule.—The charter-party contains a stipulation for a reference, "should any difference of opinion arise between the parties to that contract, either in principle or detail." Pellegrini, the charterer, is of opinion that there is an implied warranty of seaworthiness, and that it has been broken; and he has very strong grounds for so thinking. The shipowner, Russell, is of a contrary opinion; and no fairer subject for a reference could possibly arise. Then Russell will not refer; and Pellegrini is obliged to sue him: but Pellegrini always was and still is ready, and even anxious, to refer the whole; and therefore commencing that suit is no waiver of his right to have everything referred. Then Russell brings a cross action; and it is quite true that he brings it for a sum actually due, and that the existence of a cross *claim for unliquidated damages is no legal bar to the action; [*1025 and therefore the commissioner in bankruptcy was quite right

in requiring Pellegrini to give security. But the very object of a mercantile agreement for a reference is to give rights, according to justice and mercantile usage, though not according to technical law. [Lord CAMPBELL, C. J.—It may be said that your construction of the Act gives a premium on getting up cross claims for the purpose of enforcing a reference.] The Court has a very great latitude of discretion, and would never make absolute such a rule unless it were clearly shown that the cross claim was bonâ fide, and that compelling the reference would effectuate the original object of the parties in agreeing to a reference of prospective disputes. The intention of the Legislature was to give effect to the agreement of the parties. No mercantile man would doubt that here both parties intended everything to be referred together. In Pennell *v.* Walker, 18 Com. B. 651 (E. C. L. R. vol. 83), the rights of the assignees had intervened, and the case was not properly within stat. 17 & 18 Vict. c. 125, s. 11. The Court give their judgment on both grounds. Neither is applicable here.

Lord CAMPBELL, C. J.—I am of opinion that this rule should be made absolute. The enactment in question is a most salutary one. Somehow the Courts of law had in former times acquired a horror of arbitration; and it was even doubted if a clause for a general reference of prospective disputes was legal. I never could imagine for what rea-

*1026] son parties should not be *permitted to bind themselves to settle their disputes in any manner on which they agreed. The decision in Scott *v.* Avery, 5 H. L. Ca. 811,(*a*) that an agreement that there should be a reference before the party should be at liberty to sue might be so made as to be binding, was a very wholesome decision. The enactment in The Common Law Procedure Act, 1854, sect. 11, had for its object to give the parties, who should agree that their differences should be referred to arbitration, the full benefit of such a reference. This object would not be effected if the party who declined to refer might bring an action for his undisputed demands, though there were cross claims to which he might be liable, and which the other party wished to refer. That is the case here: though there is no dispute that the monthly hire is due at law, yet it appears that there is a bonâ fide cross claim for damages; and, though these could not be set off against the demand for monthly hire, it must have been in the contemplation of the parties to this agreement that in such a case the reference should include everything. Now it appears that Mr. *Lush's* client always wished for a reference: it is true that, when the other side refused to refer, and he could not force a reference, he brought an action; but that is not at all inconsistent with his readiness to refer; and it appears to me that he really always bonâ fide desired a reference, and was willing to refer everything. That being so, it appears that the case

(*a*) In Dom. Proc., affirming the judgment of the Exch. Ch. in Avery *v.* Scott, 3 Exch. 497,† which reversed the judgment of Exch. in Scott *v.* Avery, 8 Exch. 487.†

provided for by sect. 11 has arisen. There is an agreement in writing that "should any difference of *opinion arise between the parties to this contract, either in principle or detail, the same shall be referred for arbitration;" that is the first condition in sect. 11. Then has one of the parties nevertheless commenced an action at law against the other in respect of the matters so agreed to be referred? For that is the second condition. Now, I think that both the demand for the monthly hire, and the cross claim for damages, arose out of the contract, and are matters referrible within this agreement; and therefore we have power to stay the action if satisfied that it ought to be stayed. There is most ample power given to the Court in the exercise of its discretion to prevent abuse. Unless I was clearly satisfied that bonâ fide there had always been a readiness on the part of the applicant to refer, and that there was a fair dispute, and one which ought to be referred, I should say the Court ought not to interfere. But when all those things concur, as they do here, I think we should stay the action. [*1027

COLERIDGE, J.—I am quite satisfied that in this case the application is bonâ fide, and that, if we have power to enforce a reference, this is a proper case for us, in our discretion, to do so. The question therefore is, whether this case is within the meaning of the enactment. Now the enactment is, that, if there be an agreement to refer disputes, and nevertheless one of the parties brings an action "in respect of the matters so agreed to be referred, or any of them," the Court may stay the action. Now, what do these words mean? I apprehend that the meaning is satisfied if an action is brought on any of the matters which it has been *agreed may be referred, and that it is not necessary, in order to give the Court this jurisdiction, that the action should be in respect of that specific matter on which the dispute really arises. Now here, on reading the agreement, it is quite clear that, if any dispute had arisen as to whether the hire was due or not, that would have been a difference of opinion, which by the contract was to be referred. The facts are, that the hire is admittedly due; and, if the claim for it stood alone, there would be no difference of opinion between the parties; but there is a very serious difference between the parties as to another point, namely, whether the now defendant is entitled, under the contract, to damages because the ship was not seaworthy. I think the very thing which the Legislature must have intended was to avoid the necessity for actions and cross actions, and to enable the Court to say that in such a case one reference shall decide them all. [*1028

WIGHTMAN, J.—This enactment should receive a liberal construction, for the purpose of effectuating the beneficial object of the Legislature. But, though this is so, I have come to the same conclusion as the rest of the Court with great hesitation, on account of the peculiar language of the Act. Here an action is brought on a matter arising out of the

contract, on which matter itself there is no dispute. The defendant, it is admitted, has no defence at all to that action. But he has a bonâ fide cross claim, which he had made before the plaintiff's claim arose, and which is of such a nature that it cannot be brought into the present suit at all. The words of the Act give us jurisdiction to stay the action if it be *brought "in respect of the matters so agreed to be referred, or any of them." The question is, whether these words narrow the construction of the Act to cases in which the action is on a matter as to which there is a difference; or whether it is enough that there is a cross claim on which there is a difference, which by the agreement should be referred, and the action is in respect of a matter which might be included in that reference. There is a good deal of difficulty about it; but, on the whole, the spirit of the enactment is in favour of the application.

*1029]

ERLE, J.—I think this case is within both the letter of the Act and the intention of the Legislature. It is agreed that the intention was to enable the Court to carry out contracts to refer disputes as far as might be. Now here there was a written charter-party, in which I assume there was an implied agreement by the one party that the ship was seaworthy, and by the other that he should pay monthly freight. At the end of the month both those engagements have been broken. The shipowner says, pay me my monthly freight. The other says, first pay me my damages. "Oh no," says the shipowner, or rather his lawyer: "these are unliquidated damages, and cannot be set off." The charterer says in reply, "I am clearly of opinion that under this contract I ought not to pay you till you pay me; and, if you are of a different opinion, I claim to have that matter referred." He is summoned into the Bankruptcy Court; and there he says, "That is my defence." The commissioner says, most properly, "That is no defence in a Court of law." "Well," says the merchant, *"that is the precise reason why I want a reference instead of an action at law. Is it not an honest difference of opinion within the meaning of our agreement?" Now, in my opinion it is, and the case is within the letter and spirit of the Act; and, therefore, I am of opinion that the rule should be absolute. Rule absolute.

*1030]

The remaining Cases of Michaelmas Term will be reported in vol. 7

INDEX

TO

THE PRINCIPAL MATTERS.

ACCEPTANCE.

I. Of a bill of exchange on account, when evidence of a fresh promise, 506. STATUTE OF LIMITATIONS.

II. By vendee of goods above the value of 10*l.*
1. By the exercise of an act of ownership by vendee, 726. STATUTE OF FRAUDS, II. 1.
2. After bargain disaffirmed by vendor, held insufficient, 765. STATUTE OF FRAUDS, II. 2.

ACCOUNT.

Rendered by defendant only. Plea of, answerable by replication alleging error in such account.

Declaration alleged that plaintiff let mines to defendant, for twenty-one years, at a clear annual rent of 400*l.*, and a tonnage rent on the ore raised; the tonnage rent, if it amounted to or exceeded 400*l.*, to be taken instead of the 400*l.*; and if it fell short of the 400*l.*, the 400*l.* to be paid, and the deficiency to be made up by deductions from the tonnage rent of subsequent years; and, if in any year the tonnage rent, upon ordinary working, did not come up to the 400*l.*, the excess of payment (if any) in previous years, above the 400*l.*, might be set off against the 400*l.* due on such year; the meaning of the parties being that the rent of 400*l.* should at all events be paid, but, if more than that was paid in any one year, and afterwards the mines should not produce enough to pay the 400*l.*, defendant should not, throughout the term, be liable to pay more than the 400*l.* per annum, inclusive of the extra rent raised by tonnage rent: covenant by defendant to pay the rents: breach, non-payment of tonnage rent upon the quantity of ore raised.

Plea: That defendant annually accounted with plaintiff each year concerning all the ore raised in that year, and the amount of tonnage rent; and, on each accounting, a certain sum was agreed by defendant and plaintiff to be the balance due, and the balances were paid by defendant to plaintiff, and accepted by plaintiff, in full satisfaction and discharge of the tonnage rent payable.

Replication: That the accountings were not correct, but ore was omitted which ought to have been included, by mistake, and through ignorance of facts on the part of the plaintiff; and the balances stated were for less ore than was raised; and the balances were paid and accepted on such accountings.

On demurrer to plea and replication, held:

That the plea, showing only a statement of accounts on one side, did not show a statement binding plaintiff, at any rate not conclusively, and was at any rate answered by the replication showing error in the account, though not fraud. *Perry* v. *Attwood*, 691

ACKNOWLEDGMENT.

Of a debt, by acceptance of bill of exchange on account, 506. STATUTE OF LIMITATIONS.

ACT OF BANKRUPTCY.

BANKRUPT AND INSOLVENT, I.

ACTION.

I. Right of, in particular cases.

1. By assignee of insolvent against creditor, for seizure under judgment on a fraudulent warrant of attorney, 1. BANKRUPT AND INSOLVENT, I.
2. By hirer of a hackney carriage against the proprietor, 207. AGENT, I. 2.
3. By owners of ship against shippers, for shipping dangerous goods, 470. SHIP, II. 1.
4. For malicious prosecution. What is evidence of reasonable and probable cause: how that question is to be left to the jury, 511. EVIDENCE, V. 4.
5. For taking goods of plaintiff, delivered to defendant by a third party, plaintiff's bailee, *bona fide*, and with intent to give defendant a lien against plaintiff, which did not exist, 842. REPLEVIN, I.
6. Against returning officer, for wrongfully rejecting vote, 289. RATE, II. 1.
7. By allottee of surface, against the lord of the manor, for injuring foundations by negligently working mines, 643. MINE, II.
8. On policies of insurance. See INSURANCE.

II. Form of. See DETINUE, REPLEVIN, TROVER, USE AND OCCUPATION.

III. Costs of. See COSTS.

IV. Limitation of. See STATUTE OF LIMITATIONS.

ADJUDICATION.

Of Insolvent Court, effect of, as evidence against insolvent, 1. BANKRUPT AND INSOLVENT, II. 1.

ADMISSION.

Of debt, by accepting bill of exchange on account, 506. STATUTE OF LIMITATIONS.

ADVANCE.

To consignors of cargo. In whom the property lies, after bankruptcy of consignors, in an unaccepted draft, drawn by consignee on consignors, at their request, in favour of the party advancing, 742. BILLS OF EXCHANGE AND PROMISSORY NOTES, II.

AFFILIATION.

Order of. See BASTARDY.

AGENT.

I. Liability of principal for acts of.

1. Collection and delivery of goods by agents of railway Company; how far it affects the right of the Company as to charges, under their special Act, for conveyance of goods not so collected, 77. CARRIER.
2. Liability of proprietor of a hackney carriage, for luggage lost by driver.

A cab plying in the streets in London, in the ordinary way, was hired by P. to carry his luggage. The luggage was lost by the fault of the driver. On the cab was the name of H. as proprietor of it, which he in fact was. Y., a licensed driver, was actually driving at the time. P. sued H. on a contract to carry his luggage. Plea: denying the liability. On the trial it appeared that Y. each day paid a sum of money to H. for the use of a cab and two horses for the day, depositing his license with H. before he took the cab out, in compliance with the Metropolitan Hackney Carriage Acts; and Y. made what he could by the use of the cab and horses.

Held that, taking into consideration the provisions of those Acts (1 & 2 W. 4, c. 22, and 6 & 7 Vict. c. 86), the driver must be taken to be the agent of the proprietor with authority to make contracts for the employment of the cab on his account; and, consequently, that the action was rightly brought against the proprietor. *Pooles* v. *Hider*, 267

3. Liability of principal arising from ratification of agent's agreement, 868. STATUTE OF FRAUDS, I.
4. Renunciation of contract by agent of defendant, when not a dispensation by plaintiff, and therefore not a defence, 953. SALE, II. 3.

II. Rights of agent.

Of shipmaster, having signed bills of lading as agent for charterers, 232. BILL OF LADING, I.

AGREEMENT.

I. For a lease.

To grant "a lease" for "a term of" four years. Construction of, 255. CONDITION PRECEDENT, I.

II. Of sale. Admissibility of oral evidence showing that it was to be an agreement only on a certain condition, 370. CONTRACT, IX. 1.

III. Evidence of, qualifying the delivery of a deed, 986. DEED, III. 2.

IV. To refer. Stay of proceedings by Court, 1020. ARBITRATION, I.

See, generally, CONTRACT.

ALLOTMENT.

I. Qualified right of allottee of surface to support, as against allottee of mine, 593. MINE, I.

II. Right of allottee of surface to support, as against lord of manor, 643. MINE, II.

ALTERATION.

In deed, by filling up blank, 795. DEED, III. 1.

AMENDMENT.

I. Of a misdescription in a voting paper, at an election of councillors under the Municipal Corporation Reform Act, when allowable, 363. MUNICIPAL CORPORATION REFORM ACT, I.

II. Of the copy of order of maintenance, and grounds of settlement, &c., of a pauper lunatic, 919. POOR, I. 2.

APPEAL.

I. Right of.

1. Against conviction under Act for prevention of cruelty to animals.

Stat. 12 & 13 Vict. c. 92, enacts, by sect. 14, that a party convicted by a justice under the Act shall pay such penalty, damage, or compensation as the justice shall adjudge, order, or award, together with the costs of conviction, to be settled by such justice.

Sect. 25 gives an appeal to Quarter Sessions in all cases where the sum adjudged to be paid on any conviction shall exceed 2*l.*

Held: that this gives an appeal only in cases where the sum adjudged to be paid as penalty, damage, or compensation, exclusive of the costs, exceeds 2*l.*

Therefore, where a party was convicted and adjudged to pay 2*s.* 6*d.* as a penalty, and 2*l.* 7*s.* 6*d.* for costs, and gave notice of appeal, which he afterwards abandoned, and the Sessions made an order upon him to pay a certain sum to the respondent towards his costs in the appeal, this Court issued a certiorari to bring up the last-mentioned order, to be quashed. Though sect. 26 enacts that no order shall be removed by certiorari. *Regina* v. *Justices of Warwickshire,* 837

2. Against an order of Commissioners under a local Act.

A town improvement Act gave a right of appeal against any order of the Commissioners to any person aggrieved by it.

At a meeting of rate-payers it was resolved that the Commissioners be empowered out of the town funds (raised under the Act) to prosecute an application to Parliament for a local act. The application failed. The Commissioners made an order for the payment of the expenses out of the town funds. The mover of the resolution empowering the Commissioners to promote the bill appealed as a ratepayer against this order.

Held, that he was precluded from appealing as aggrieved by an act which he had sanctioned. *Harrup* v. *Bayley,* 218

II. Notice of, under stat. 41 G. 3, c. 23.

Sessions bound to respite for want of notice to all the proper parties.

On an appeal against a poor rate, the respondents at the next Session required the appellant to prove notice of appeal to the proper parties, under stat. 41 G. 3, c. 23; the appellant having failed to do so, the Sessions made an order dismissing the appeal, with costs.

Held, that the Sessions had no discretion, but were bound to enter and respite the appeal. The order dismissing was quashed as made without jurisdiction; and a rule to enter continuances and hear the said appeal upon the merits was made absolute. *Regina* v. *Eyre,* 992

III. Costs of, against decisions of Court below in granting, discharging, or making absolute a rule, 675, 681. COMMON LAW PROCEDURE ACT, III.

APPRENTICE.

Order by justices, for binding a pauper apprentice. What amount of jurisdiction the order must show on the face of it, 715. JURISDICTION, IV. 1.

ARBITRATION.

I. Agreement to refer to. Stay of proceedings in action.

By an agreement in writing, a ship was chartered at a fixed sum per month. It was provided, that, "should any difference of opinion arise between the parties to this contract, either in principle or detail, the same" should be referred. The charterer claimed from the shipowner damages for an alleged breach of an implied warranty of seaworthiness, and desired to have this claim referred. The shipowner did not comply. Then the charterer commenced an action. The monthly hire having become due, the shipowner demanded it from the charterer, and, on his refusal, commenced an action against him. The ground of refusal was that the charterer desired to have all matters referred together whereby he would have the benefit of a set-off. On a rule obtained by the charterer to stay proceedings in the shipowner's action: Held (Wightman, J., dubitante), that, though there was no dispute as to the subject-matter of the action itself, viz. the hire, which was admittedly due, the circumstances gave the Court jurisdiction under stat. 17 & 18 Vict. c. 125, s. 11. And the Court, being satisfied, notwithstanding the pendency of the cross

action, that the charterer had always been desirous to refer all matters, and that the application was bonâ fide, and that justice would be done by staying the action, made the rule to stay proceedings absolute. *Russell* v. *Pellegrini*, 1020

II. Compulsory reference, under Common Law Procedure Act, 1854.

1. Constructive consent of parties to enlargement of time by arbitrator.

On a compulsory reference under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), it is no objection to entering up judgment on the award, under sect. 3, that the award was made more than three months after the arbitrator entered on the reference, though the order of reference names no time, and no written consent for enlarging the time has been given by the parties, if it appear that the parties have, within a month before the making of the award, acted upon the reference as still subsisting, such acting estopping them from saying that the circumstances necessary to give jurisdiction to the arbitrator did not exist. *Tyerman* v. *Smith*, 719

2. Power of Judge to remit to arbitrator.

The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 8, giving the Court or a Judge power to remit matters referred to the reconsideration of the arbitrator, applies to references authorized by a submission containing a clause that it may be made a rule of Court, and not expressly excluding such power. The section is not confined to compulsory references ordered under the powers of the Act.

When an award is remitted back to the arbitrator only to set it right on the face of it, he is not bound to rehear the parties. *Morris's Arbitration*, 383

III. Costs of action ordered to abide event of award; when plaintiff is entitled to them, 215. Costs, I. 2.

APPOINTMENT.

Of inspector of weights and measures for a district, in whom, 830. Jurisdiction, III. 3.

ARCHBISHOP.

When compulsory on him to proceed to hear and pronounce sentence, having issued a commission under the Church Discipline Act, 546. See Church Discipline Act.

ARTIFICER.

Within meaning of Truck Act. See Truck Act.

ASSIGNEE.

See Bankrupt and Insolvent, III.

ASSIGNMENT.

I. Of shares.

1. What is a transmission, what a transfer, of shares, within the meaning of the Companies Clauses Consolidation Act, 277. Company, II. 1.

2. What description of deed, conveying shares in a joint stock Company, the Company are bound to register, under provisions similar to those of the Companies Clauses Consolidation Act, 415. Company, II. 2.

II. Of personalty generally.

Equitable assignment by wife to husband, of money bequeathed to her use, and previously assigned by her to trustees in trust for herself. When such equitable assignment good as against the trustees, in an action by the husband, 497. Husband and Wife.

III. Fraudulent.

What is.

1. A charge by warrant of attorney, void within stat. 1 & 2 Vict. c. 110, s. 39, 1. Bankrupt and Insolvent, III. 1.

2. Not a bill of sale given as security for fresh advances only, 296. Bankrupt and Insolvent, I.

ASSURANCE.

See Insurance.

ASYLUM (COUNTY LUNATIC).

Expenses of conveyance of pauper lunatic, 919. Poor, I. 2.

ATTORNEY.

I. When privileged to lay venue in Middlesex, 932. Trial, I.

II. When liable to pay costs of taxation, under stat. 6 & 7 Vict. c. 63, 285. Costs, II. 1.

ATTORNEY. (WARRANT OF.)

Warrant of Attorney.

AUCTION.

Purchaser of an estate precluded from making an objection to title excluded by the conditions of sale, 659. Contract, VII. 5.

AUDITOR.

I. Poor law.

His disallowance of attorney's bill of costs final, 408. Certiorari, III.

II. Under Metropolis Local Management Act.

Action for malicious rejection of vote at election of auditor, 289. Rate, II. 1.

AVERAGE.

See INSURANCE.

AWARD.

I. Enlargement of time by arbitrator. Constructive consent of parties, 719. ARBITRATION, II. 1.

II. Rehearing of parties by arbitrator, on award being remitted, 383. ARBITRATION, II. 2.

III. Costs of action ordered to abide event of award. When plaintiff is entitled to them under the award, 215. COSTS, I. 2.

BAILIFF.

See COUNTY COURT, II.

BAILMENT.

I. Liability of bailor to bailee.

1. Of shippers of goods of a dangerous nature on board a general ship, whereby cargo damaged, without the knowledge of shipowners, 470. SHIP, II. 1.

2. Of vendee of a horse, afterwards permitting it to remain in possession of vendor, 726. STATUTE OF FRAUDS, II. 1.

II. Liability of bailee to bailor.

1. Of innkeeper for goods of guest.

Where the goods of a guest at an inn are lost, the innkeeper is liable as for breach of duty unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances. Where there is such negligence, the innkeeper is not responsible.

Therefore, where an innkeeper set up such negligence, in answer to an action by the owner for the loss of goods, and the Judge told the jury that the innkeeper was responsible unless there had been gross negligence on the part of the owner, but did not explain what would constitute gross negligence: Held, a misdirection, insomuch as the jury might have understood that the plaintiff was entitled to recover unless there had been an absence, on his part, of even the loosest degree of care. *Cashill* v. *Wright*, 891

2. Of shipowner to shipper, for damage to goods of the latter, caused by leakage from goods of a third party, 477, note (*b*). SHIP, III. 1.

3. Of tenant agreeing with landlord to purchase goods of which tenant was in possession as such, 765. STATUTE OF FRAUDS, II. 2.

III. Liability of third parties for acts of bailee.

Liability of third party for goods of bailor delivered to him by bailee with intent to give such third party a lien, 842. REPLEVIN, I.

BANK.

Resolution of directors of joint stock company to borrow money from bank, on bond; how far presumable, when money is borrowed, and authority so to borrow exists, 327. COMPANY, I. 2.

BANKRUPT AND INSOLVENT.

I. Act of bankruptcy.

Bill of sale, when held not.

B., a trader, by bill of sale, conveyed all his stock, and all the stock that should during the continuance of the security become his, with a power of sale, to C., as a security for money to be advanced by C. The bill of sale was drawn up as a security for an existing debt, as well as for fresh advances; but this was a mistake, the whole consideration being fresh advances not to exceed a certain sum. C. made the advances; the property in fact was of about three times the value of the advances. B. was at this time in reality insolvent: but the Court, which had power to draw inferences of fact, drew the inference that the advances were bona fide asked for and made with a view to keep the business going, and in the belief that they would enable B. to get over his difficulties. Afterwards C. took possession of the goods. B. being declared a bankrupt, his assignees brought trover against C., contending that the transaction in question was itself an act of bankruptcy. On a case stating these facts, in which the Court had power to draw inferences of fact:

Held, that the transaction must be viewed as if the bill of sale had been drawn as it was intended to be, entirely as a security for fresh advances.

That the effect of pledging the whole of the trader's property for such advances was not necessarily to delay his creditors, as the advances, even if bearing a small proportion to the value of the property pledged, might be of more advantage to the trader and his creditors than the property itself; and, consequently, that the bill of sale in this case, being in fact bona fide, was not, in point of law, fraudulent, nor an act of bankruptcy. *Bittlestone* v. *Cooke*, 296

II. Discharge by Insolvency Court.

Terms on which Court of Queen's Bench will set aside the outlawry of an insolvent, finally discharged by Insolvency Court.

Defendant was outlawed on final process at

the suit of the plaintiff. Defendant then petitioned the county court, under The Insolvent Debtors' Act, for his discharge, inserting the judgment debt in his schedule; and that Court ordered him to be discharged forthwith. Defendant then moved this Court to set aside the outlawry.

This Court set aside the outlawry on the terms of the defendant assigning to the provisional assignee, if required by the Court for relief of Insolvent Debtors, all goods belonging to him, if any, up to his final discharge, which did not vest in the provisional assignee by the vesting order, and paying the costs of the outlawry, if any, not included in the schedule, the costs of the application to this Court, and the costs of an attendance on the same matter before a Judge at Chambers. *Basterfield* v. *Sproye*, 376

III. Assignees.

Rights of.

1. Against a creditor having issued execution upon a judgment on a warrant of attorney, void within stat. 1 & 2 Vict. c. 110, s. 59.

Trover by the assignee of F., an insolvent debtor, for a conversion in the time of the insolvent. Pleas, amongst others, Not guilty, and a plea justifying the conversion as being a seizure under a fi. fa. issued before the insolvency on a judgment against F. in favour of the defendant. Replication: that F., within three months before his imprisonment, being in insolvent circumstances, with a view of petitioning the Court, fraudulently charged his estate in favour of defendant, being a creditor, by a warrant of attorney void within stat. 1 & 2 Vict. c. 110, s. 59, and that the judgment was on that warrant of attorney. Issue was taken on the replication. The verdict was found for the plaintiff on all the issues; and he had judgment. Error was brought on the record, and also on a bill of exceptions, which set forth the evidence. By this it appeared that the judgment was on a warrant of attorney, voluntarily given with a view of petitioning the Court, and the defendant had disposed of the goods seized before the insolvency. The Judge ruled that this was evidence of a conversion, to which ruling there was an exception.

Held, by Jervis, C. J., Alderson, B., Creswell, J., and Martin, B., with whom Sir W. Maule, before his retirement from the bench, agreed, that the warrant of attorney was, under stat. 1 & 2 Vict. c. 110, s. 59, wholly void, and not merely voidable; that the assignee might sue; and that trover for a conversion of F.'s goods before the insolvency was a proper form of action; that therefore the judgment was right, and the ruling unexceptionable.

Held, by Williams, J., and Crowder, J., with whom Lord Wensleydale, before his retirement from the Bench, agreed, that the warrant of attorney was not absolutely void, but valid till the assignee elected to avoid it. That there was consequently no wrongful conversion before the insolvency; and that the plaintiff, if entitled to recover at all, could not recover in trover; and that there ought to be a venire de novo on the bill of exceptions on the ruling as to Not guilty, and judgment non obstante veredicto on the insufficiency of the replication to the special plea.

On the bill of exceptions, it appeared that the plaintiff had tendered in evidence an adjudication of the Insolvent Court, discharging F. after he had been in custody for one year, and had proved that immediately afterwards he was allowed to go free by the defendant, who was his only detaining creditor. The defendant's counsel offered to admit that such an order was made, but objected to its being read. The Judge ruled that it might be read; to which the defendant excepted. It was read; and it stated the detainer for a year to be on the ground that the warrant of attorney was a fraudulent preference.

Held, by the whole Court, that the adjudication was admissible, not as evidence of the truth of the ground on which it purported to be made, but because that adjudication, followed by the immediate discharge of F., was evidence of defendant's complicity with F. And that the plaintiff was not bound to take the defendant's admission of its effect.

Judgment affirmed. *Billiter* v. *Young*, 1

2. To the property in an unaccepted draft, drawn by the consignees of a cargo upon the bankrupts (the consignees) before bankruptcy at their request, in favour of a third party who had made advances to them on the cargo, 742. Bills of Exchange and Promissory Notes, II.

3. To unfixed materials of an unfinished ship, in the course of building by the bankrupt for a third party.

J., a shipbuilder, agreed to build an iron steamship for plaintiff on the same terms as other vessels which he had previously built for him. By reference to these terms it appeared that the price was to be 16,000*l.*, payable by instalments, the first instalment to be 1000*l.* payable immediately. The second, third, and fourth, of 1000*l.* each, to be payable at the end of two, three, and four months respectively from the date of the order; the remaining 12,000*l.* to be payable by instalments of 3000*l.* each, the first 3000*l.* at the end of six months, provided the vessel was plated and decks laid; the second 3000*l.* at the end of eight months, provided the vessel was ready for trial; the third 3000*l.* at the end of eleven months, provided the vessel was according to contract and perfectly com-

pleted; the last instalment of 3000*l.* at the end of thirteen months; the vessel to be built under the superintendence of H., appointed for that purpose by plaintiff, and according to his specifications.

The building commenced under the superintendence of H. Plaintiff advanced money to J. in anticipation of the instalments. In the 10th month J. became bankrupt: the vessel was at that time unfinished in J.'s yard; and engines and parts of the frame work of the vessel, adapted for the unfinished ship, but not yet fixed into her frame work, were there also. Plaintiff claimed the unfinished vessel and these engines and parts of the frame work. The assignees of J. kept them as part of the estate of J. The amount paid in advance by plaintiff exceeded the value of this property.

In an action by plaintiff against the assignees, a case was stated for the opinion of this Court, giving power to draw inferences of fact, and setting forth the above facts, and also that the unfinished ship was known at J.'s yard as plaintiff's ship, and that H. had, with J.'s consent, before the bankruptcy, stamped plaintiff's name on the keel of the vessel, for the express purpose of indicating that she was the property of plaintiff. The questions were, whether the property belonged to plaintiff or the assignees. And whether plaintiff could recover special damages for the detention of the ship, beyond its value.

The Court of Queen's Bench decided that the plaintiff was entitled to recover in respect both of the ship and of the loose engines and materials; and that he was also entitled to recover special damages.

On Error to the Court of Exchequer Chamber, that Court concurred with the Court of Queen's Bench as to the ship, but held that the plaintiff was not entitled to recover in respect of the loose engines and materials, and that the damages were to be assessed in respect of the ship only. *Wood* v. *Bell*, 355

4. To machinery assigned by bankrupt before bankruptcy, the indenture of assignment not having been registered under stat. 17 & 18 Vict. c. 36.

J. mortgaged to M. the freehold of a mill, with machinery thereon. Afterwards J. assigned to defendant the equity of redemption, and certain machinery which had been fixed in the mill since the first mortgage. Afterwards, by indenture, in consideration of 500*l.* paid to J. by defendant, J. did bargain, sell, assign, and set over to defendant machinery erected since the conveyance of the equity of redemption, subject to redemption on payment of the 500*l.*; and, by the same indenture, J. covenanted that the mill and machinery specified in the previous conveyance of the equity of redemption should be charged with the 500*l.*, as well as the money before secured upon it.

The machinery comprised in the last-mentioned indenture was erected for the purpose of carrying on the manufactory in the mill: and, for the more conveniently so doing, a part of it was screwed, nailed, and otherwise fixed to the mill.

J. became bankrupt: in anticipation of which, defendant took possession, and entered on the mill and the machinery, J. having been in possession for more than 21 days after the making of the indenture, up to the time of such entry. The machinery comprised in the last-mentioned indenture still remaining on the premises, J.'s assignees claimed it, on the ground that such indenture had not been registered under the stat. 17 & 18 Vict. c. 36.

Held, that they were entitled to the machinery: the conveyance thereof being void as against them for want of registration; for that, under the interpretation clause (sect. 7), the machinery was personal chattels, as the intention of the parties appeared to be that the machinery should pass, separately from the realty, and so it had not become parcel of the freehold by annexation subsequent to the conveyance of the equity of redemption. *Waterfall* v. *Penistone*, 876

Action by.

5. Administration of interrogatories under Common Law Procedure Act, 1854, 462. COMMON LAW PROCEDURE ACTS, I. 5.

IV. Creditors.

Release by composition deed. Effect, as regards the rights of a creditor, of a blank, left in the deed for the insertion of the amount of his debt, being erroneously filled up, without his authority, after execution of the deed by him, 795. DEED, III. 1.

BASTARDY.

What is sufficient service of summons on putative father.

A summons duly issued by a justice against the putative father of an English bastard child was served on the putative father in Scotland, where he had gone to reside. He did not attend before the justices in petty sessions. On proof of this service in Scotland, and that it was in sufficient time to have enabled the putative father to attend, the justices heard the case and made the filiation and maintenance order.

The order having been brought up by certiorari,

Held, by Coleridge, Erle, and Crompton, Js., that service out of England and Wales was not due service under stat. 7 & 8 Vict. c. 101, ss. 2 and 3; and the order was quashed.

Lord Campbell, C. J., dissentiente. *Regina* v. *Lightfoot*, 822

BENEFICIAL OCCUPATION.

See RATE.

BILL OF COSTS.

See COSTS.

BILL OF EXCEPTIONS.

What is the meaning of "*no* evidence" to go to the jury, when that question is raised by bill of exceptions: what, when it is raised before the Court upon leave reserved at the trial, 953. SHIP, II. 3.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. What is a promissory note.

Defendant signed, and delivered to plaintiff, a written instrument, in the following words: "Nine months after date, I promise to pay to the secretary for the time being of The Indian," &c., "Society, or order, Company's rupees, twenty thousand, with interest at the rate," &c.; "and I hereby deposit in his hands twenty-two Union Bank shares," "by way of pledge or security for the due payment of the said sum of Company's rupees, twenty thousand, as aforesaid; and, in default thereof, hereby authorize the said secretary for the time being, forthwith, either by private or public sale, absolutely to sell or dispose of the said twenty-two Union Bank shares, so deposited with him; and out of the proceeds of sale to reimburse himself the said loan of Company's rupees, twenty thousand, and interest thereon, as aforesaid, he rendering to me any surplus which may be forthcoming from such sale. And I hereby promise and undertake to make good whatever, if anything, may be wanting over and above the proceeds of such sale, to make up the full amount of the said loan of Company's rupees, twenty thousand, and interest as aforesaid."

Plaintiff, at the time of the making and delivering of this paper, and thenceforward continually till the expiration of the nine months, and ever since, had been secretary of the Society. An action having been brought by him against defendant, after the expiration of the nine months, as upon a promissory note, the declaration averring the plaintiff to have been and to be secretary as aforesaid, and the defendant having denied making "the alleged promissory note:"

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Q. B., that the instrument was not a promissory note, the payee being uncertain at the time of the making. *Cowie* v. *Stirling*, 333

II. Payee. (Bill of exchange.)

Right of property in an unaccepted draft, drawn by consignees of cargo upon consignors, afterwards bankrupt, to protect an advance to the latter, before their bankruptcy, by a third party.

L. & Co., a London firm, agreed with C. & Co., also a London firm, to make advances on a cargo per S., consigned to M. & Co., at Moulmein; on the terms that L. & Co. should have a lien on the cargo and its proceeds; and that M. & Co. should remit the proceeds as soon as realized through L. & Co. L. & Co. accordingly advanced to C. & Co. 6000*l*. M. & Co. were informed of the arrangement and agreed to it. Afterwards L. & Co. requested C. & Co. to pay off their advances. C. & Co. informed M. & Co. of this, and requested them to draw on them in favour of L. & Co. in anticipations. L. & Co. were not aware of this application. M. & Co. wrote to C. & Co., expressing dislike to the style of draft, but assenting to do as requested, and adding, in a letter of the same date, "we trust you will take care we are protected in this matter." Enclosed was a letter, addressed to L. & Co. unsealed, advising them of a draft. The draft was on C. & Co., payable six months after sight to L. & Co. C. & Co. accepted the draft, handed it and the letter to L. & Co., and afterwards duly honoured the draft. Afterwards a similar draft was sent in a similar letter, stating the draft to be "in anticipation of the arrival of the S.," addressed to L. & Co., but open, and in a letter to C. & Co. When it arrived, C. & Co. were in such circumstances as to be aware that they could not honour it. They therefore suppressed both letter and draft; M. & Co. approved of their conduct. Subsequently C. & Co. became bankrupts; and the unaccepted draft came into the hands of their assignees. L. & Co., whose advances had not been paid off, demanded the draft from them, and, on its being refused, brought trover. On a special case stating the above facts:

Held, that L. & Co. had no property in the draft, which had not been drawn under the agreement to which they were a party, but under a separate arrangement between C. & Co. and M. & Co.; and that, under the arrangement between C. & Co. and M. & Co., the former would have done wrong if they had handed over the draft to L. & Co. when aware that they could not protect it. *De Lizardi* v. *Pennell*, 742

III. Endorsee.

Admitting his endorsement to plaintiff, estop-

ped from denying previous endorsement to himself.

Declaration charged that P. drew a bill of exchange payable to his own order, and endorsed it to defendant, who endorsed it to plaintiff; and that the bill was dishonoured, and defendant did not pay it. Plea, denying the endorsement to the defendant. On demurrer:

Held, by Lord Campbell, C. J., Wightman and Erle, Js., that the plea was bad, the defendant being estopped, by his admitted endorsement, from traversing the endorsement to himself.

Dubitante Crompton, J. *MacGregor* v. *Rhodes*, 266

IV. Payment by.

On account: when evidence of a fresh promise, 506. STATUTE OF LIMITATIONS.

BILL OF LADING.

I. Signed by master of ship, as agent for charterers. Right to freight.

By memorandum for charter, made at Liverpool between plaintiff, as master, for the owners of the ship S., and M. & Co., it was agreed that (excepting the cabin, state rooms, and room for stowage of cables, &c., and crew) the vessel should be immediately made ready, and take on board from the charterers (who were to have the full reach of the hold, from bulkhead to bulkhead, including the half deck) a full cargo of merchandise and specie, the owners employing sufficient hands for the purpose, and should proceed to Buenos Ayres, and there deliver the cargo in the usual and customary manner agreeably to bills of lading, and so end the voyage: in consideration whereof the affreighters to deliver the cargo alongside to be laden, and cause it to be received at the port of discharge in the usual and customary manner; and "pay for the use and hire of the said vessel, in respect of the said voyage," 775*l.* "lump sum, in full, charterers paying for landing the measurement portion of the cargo, or 850*l.* in full, the shipowners paying the lighterage, at charterers' option, to be decided before sailing from L.:" payment to be made by the captain receiving "such freight as the charterers may have payable abroad as per bills of lading, not exceeding half, or by an order handed over to him by the charterers, at their option, at the current rate of exchange, which order is to be payable at the port of discharge; and the balance to be paid by the charterers' acceptance, payable in London, at three months date from the day of sailing." The charterers to name the lumpers and stevedores for taking in cargo and stowage; the ship to pay the lumpers, the charterers the stevedores, both to be under the direction of the master, and owners to be responsible for improper stowage: such goods only as the charterers might direct to be received on board. "That the master shall, at the charterers' request, sign bills of lading in the usual and customary manner, and at any rate of freight that may be filled up and made payable in any manner the charterers may choose, without prejudice to this charter." The vessel to be consigned to the charterers' agents at her port of discharge.

The charterers put up the S. as a general ship: plaintiff, as master, signed bills of lading at such freight and payable in such manner as they requested. They elected to pay the 850*l.* Part of the bills of lading made 244*l.* 5*s.* 2*d.* payable at B. A.: and this plaintiff received at B. A. The rest of the bills of lading, made the freight payable "here" (Liverpool) as per margin; by the margin, it was to be paid one month after sailing, ship lost or not lost: it was not specified to whom the payment was to be made. The charterers paid a small part of the balance of the 850*l.* in cash, and, for the rest, gave their acceptance at three months, payable in London. Before maturity, they suspended payment. Plaintiff then claimed from the shippers the portion of the bill of lading freight not yet paid; the charterers also claimed it. The plaintiff himself was one of the owners.

On a case stated, with power to the Court to draw inferences of fact: Held, that the plaintiff was not entitled to claim from the shippers the freights last mentioned, he having signed the bills of lading in the character only of agent for the charterers, and there being no contract between the shipowners and the shippers. *Marquand* v. *Banner*, 232

II. Liability of shipowner, under ordinary bill of lading, for damage done to the goods of one party by those of another, 477, note (*b*). SHIP, III. 1.

BILL OF SALE.

Given as security for fresh advances only, not fraudulent, nor an act of bankruptcy, 296. BANKRUPT AND INSOLVENT, I.

Of machinery, void for want of enrolment under stat. 17 & 18 Vict. c. 36, 876. BANKRUPT AND INSOLVENT, III. 4.

BISHOP.

See CHURCH DISCIPLINE ACT.

BOARD OF HEALTH.

See PUBLIC HEALTH ACT.

BOND.

I. To secure a loan.

1. Bond by joint stock company to a bank.

Resolution of directors authorising it, when presumable, 327. COMPANY, I. 2.

2. Bond by churchwardens, under Church Building Act. What is a "borrowing" under the Act, 807. RATE, II. 2.

II. To secure performance of an agreement.

By mill-owners agreeing to carry on business according to the resolution of the majority, void for restraint of trade, 47. CONTRACT, VII. 1.

III. By statute.

1. Replevin bond, under County Court Act, when forfeited by suit not being effectually prosecuted, 571. REPLEVIN, II.

2. Surety bond to high bailiff of county court, to indemnify against misconduct of bailiff. Sureties not now bound to indemnify, 902. COUNTY COURT, II.

BRIBERY.

See CORRUPT PRACTICES PREVENTION ACT.

BUILDING ACT. (7 & 8 VICT. c. 84.)

Order of justices, under sect. 79, dismissing surveyor. When bad for want of jurisdiction.

A complaint under the Metropolitan Building Act, 7 & 8 Vict. c. 84, s. 79, was preferred to the Quarter Sessions by W., in which W. stated that B. was district surveyor of L., and that W. built in L. three dwelling-houses of the fourth rate, and that three privies, attached to the back of and belonging to them, one to each house, were built and carried up at the same time, and covered in within twenty-one days after the dwelling-houses had been covered in; and that B. first delivered an account claiming 2*l.* 2*s.* "in respect of each of the said dwelling-houses," which was paid to him, and afterwards an account of 10*s.* "in respect of each of the said privies," and did, on, &c., "in his capacity of surveyor as aforesaid, wilfully receive the same from this complainant, he," B., "not being entitled thereto under the said Act. And so the said" W. "complains" that B., "in his capacity of surveyor as aforesaid, did, on the day and year last aforesaid, in manner and form aforesaid, unlawfully demand and receive a fee to which he was not entitled under the said Act: contrary to the provisions of the said Act." The Sessions made an order, stating that, upon hearing a complaint of W., in writing, against B., setting forth the nature and particulars of the offence charged, and alleging that B., "in his capacity as surveyor as aforesaid, had demanded and wilfully received a fee to which he was not entitled under the said Act, contrary to the provisions of the said Act," and upon hearing counsel on behalf of complainant and B., and also B., and the evidence for each, "it appears unto this Court that the said complaint is well founded:" and the Court dismissed B. from the office of surveyor.

The order of Sessions was removed by certiorari; and motion was made to quash it. Sect. 104 enacts that it shall not be lawful to remove any order, made under the Act, by certiorari.

It appeared by affidavit that the second fee was claimed on the ground that, within the meaning of the Act, the privies had not been covered over within the twenty-one days, and were distinctly rated; on which ground also B. had insisted at Sessions, but which W. had disputed.

Per Coleridge, Wightman, and Erle, Js., order quashed for want of jurisdiction. Per Coleridge, J., because sect. 79 gave jurisdiction to the Sessions in cases only where, supposing the surveyor to have done all he asserted himself to have done, he would still be entitled to no remuneration. Per Erle, J., because the jurisdiction was given only in cases where the offence brought before the Sessions was that of claiming a fee to which the surveyor knew himself not to be entitled, whereas there was here a bonâ fide dispute as to the law.

Dissentiente Lord Campbell, C. J., on the ground that the complaint in effect charged the offence of intentionally, fraudulently, and knowingly taking a fee to which the surveyor was not entitled; and that this showed jurisdiction; which was not affected by the affidavits. *Regina* v. *Badger*, 137

BURIAL ACTS.

(15 & 16 VICT. c. 85, and 16 & 17 VICT. c. 134.)

What is a vestry "elected under a local Act" &c., within the meaning of s. 52 of the former Act, 225. VESTRY, I.

BUTTY COLLIER.

See TRUCK ACT.

CALLS.

Action by Company: Plea of fraud, 761. COMPANY, II. 3.

CANDIDATE.

Parliamentary. See CORRUPT PRACTICES PREVENTION ACT.

CARGO.

Liability of shipper to shipowner, for destruction of cargo caused by the shipping of goods of a destructive nature, without the knowledge of shipowner, 470. SHIP, II. 1.

Liability of shipowner to shipper, for damage

to the latter's goods by leakage from goods shipped by a third party, 477, note (*b*). SHIP, III. I.

Contracts, by charter-party, to load cargo. See SHIP.

CARRIER.

Railway Company. What are "small" and "separate" "parcels" and "manufactured goods," under special Act. Effect of contract with agents to collect.

By special Acts a railway Company was entitled to charge for goods carried on their line at rates not exceeding certain rates per ton. They were permitted to charge a higher rate for small parcels not exceeding 500 lbs. weight, provided that "articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages." Plaintiff, a carrier, sent to the Company at once many packages, all consigned to one consignee, each less than 500 lbs., of articles of similar classes, but not being separate packages of one article. The Company charged for them as separate parcels.

Held, that they were justified in so doing; the proviso applying only to articles that were of such a nature that a large quantity was generally made up in separate packages.

The plaintiff also sent a parcel of coffee less than 500 lbs. weight; and afterwards, on the same day, another parcel of coffee, both consigned to himself, and for the same train. When the first was left, notice was given that plaintiff probably would send more; but it was not received on any special terms. The Company charged for these as separate parcels.

Held, that they were justified in doing so.

The Company were entitled to charge a certain rate "for all cotton and other wools, drugs, and manufactured goods." Held that this meant, not all goods on which human skill was employed, but those articles made in what are in popular language called manufactories.

The Company agreed with agents to collect and deliver goods for them, charging the public a small charge for doing so in addition to the charge for conveyance on the railway; to those agents the Company allowed in addition a sum out of the receipts of the Company. The plaintiff, who collected and delivered his own parcels but was charged as highly as the rest of the public, complained that in effect this arrangement caused his goods to be charged higher than those sent through the agents, and that the difference was an overcharge. By their Act the Company were to charge all persons equally for conveyance, but there was a proviso that they might make agreements as to the collection and delivery of merchandise; and there was an appeal given by the Act to the Sessions by any one prejudiced against any arrangement giving special facilities to others.

Held that, under these enactments, the agreement with the agents, against which there had been no appeal, did not render the charges to the plaintiff overcharges. *Parker* v. *Great Western Railway Company*, 77

CERTIFICATE.

By judge, that there was sufficient cause for bringing action in superior Court: at what time it may be given and endorsed on the record, 683. SHERIFF, I.

CERTIORARI.

Construction of clause taking away.

I. Of sect. 26 of the Act for Prevention of Cruelty to Animals (12 & 13 Vict. c. 92), 837. APPEAL, I. 1.

II. Of sect. 104 of the Metropolitan Building Act (7 & 8 Vict. c. 84), 137. BUILDING ACT.

III. Of sect. 39 of stat. 7 & 8 Vict. c. 101.

Stat. 7 & 8 Vict. c. 101, s. 39, makes the decision of the auditor of the poor law on any question as to an attorney's bill final, at all events as against the overseers, unless the bill has been taxed before it is presented to the auditor; and therefore the Court cannot grant, at the instance of the overseers, a certiorari to bring up such a disallowance of such a bill of costs.

Whether, if the complaint were by a rate-payer that the bill was improperly allowed, the decision of the auditor would be final as against the rate-payer, because the bill was not taxed, *Quære*. *Regina* v. *Hunt*, 408

CHAMBERS.

Jurisdiction of Judge at, to order execution against a shareholder of a Joint Stock Company, 1015. COMPANY, III. 1.

CHARTER-PARTY.

See SHIP.

CHATTEL.

What are "personal chattels," within sects. 1, 7, of stat. 17 & 18 Vict. c. 36, 876. BANKRUPT AND INSOLVENT, III. 4.

CHURCH BUILDING ACTS.

Bond by churchwardens, under stat. 58 G. 3, c. 45, s. 59, to secure a loan made for the purposes of the Act. What is a "borrowing," within the statute, 807. RATE, II. 2.

CHURCH DISCIPLINE ACT.

(3 & 4 Vict. c. 86.)

How far compulsory on Archbishop to proceed to hear and pronounce sentence, the commission issued by him having reported a primâ facie ground for further proceedings.

On the application of a clerk holding a benefice in the diocese of B,, in the province of Canterbury, complaining that a clerk holding preferment in the same diocese had published, in the same diocese, doctrines contrary to the Articles of the Established Church, the patronage of the preferment being in the Bishop of B., the Archbishop of Canterbury, under the provisions of stat. 3 & 4 Vict. c. 86, ss. 3, 24, issued a commission, which reported that there was sufficient primâ facie ground for instituting further proceedings.

Held that, the complainant thinking fit to proceed against the party accused, the Archbishop was bound, under sects. 9, 11, to require the appearance of the party complained against, and to hear the cause and pronounce sentence, and had no discretion in the matter.

And that the appearance and hearing ought to be within the diocese of B., and not in any place without such diocese, though within the province of Canterbury. *Regina* v. *Archbishop of Canterbury*, 546.

CHURCH RATE.

See RATE, II.

CHURCHWARDENS.

I. Action against, for maliciously rejecting plaintiff's vote at an election of vestrymen and auditors, under stat. 18 & 19 Vict. c. 120. Pleadings as to validity of a rate alleged by defendant to be due from plaintiff at the time of such election, 289. RATE, II. 1.

II. Bond by, to secure a loan under Church Building Act. What is a "borrowing" within the statute, 807. RATE, II. 2.

COLLISION.

See MERCHANT SHIPPING ACT.

COMBINATION.

By mill-owners, to carry on business according to the resolution of the majority. Void for restraint of trade, 47. CONTRACT, VII. 1.

COMMITTEE.

Consent of, to borrowing by churchwardens for church repairs, under Church Building Act, when presumable, 806. RATE, II. 2.

COMMON LAW PROCEDURE ACTS.

1852 (15 & 16 Vict. c. 76); 1854 (17 & 18 Vict. c. 125).

I. Proceedings before trial.

1. Stay of proceedings by Court, on the ground of a prior agreement to refer to arbitration, (1854, s. 11.) 1020. ARBITRATION, I.

2. Claim by plaintiff of mandamus (1854, s. 68); to what obligations it is intended to apply.

On demurrer to a declaration claiming a writ of mandamus to enforce the execution of a lease from the plaintiff to the defendant, in fulfilment of a contract between them,

Held, that the declaration was bad, as The Common Law Procedure Act, 1854, sect. 68, applies only to the fulfilment of such duties as might be enforced by the prerogative writ of mandamus, and not to the specific performance of contracts. *Benson* v. *Paul*, 273

3. Equitable pleadings (1854, s. 83), as to rights and liabilities of husband and wife under a marriage settlement, 497. HUSBAND AND WIFE.

4. Inspection of documents (1854, s. 50), and stat. 14 & 15 Vict, c. 99, s. 6). Under what circumstances Court will make an order.

The powers of ordering the inspection of documents given by statute to the Courts of Common Law will not be exercised except for the purposes of assisting a bonâ fide suit. Therefore, where an action was commenced, not bonâ fide for the purposes of obtaining redress against the defendant, but with a view to obtain the inspection of documents in the possession of the defendant, for the purposes of obtaining evidence in another action to which the defendant was not a party, the Court refused to order an inspection. *Temperley* v. *Willett*, 350

5. Administering of interrogatories (1854, s. 51). To what kind of discovery the clause giving power to interrogate applies.

In an action of trover by the assignees of an alleged bankrupt, the defendant obtained a rule Nisi to administer interrogatories to the plaintiffs to discover what case they intended to set up at the trial, and on what acts of bankruptcy they intended to rely.

Held, that the interrogatories were inadmissible; at all events on the ground that they were fishing interrogatories, asking for a disclosure of the evidence in support of the plaintiffs' case. *Semble*, that the power to interrogate under the Common Law Procedure Act, 1854, is confined to such discovery as might be obtained in equity on evidence, and does not extend to a discovery of the case itself, as distinguished from the evidence. *Edwards* v. *Wakefield*, 462

6. Interrogatories and inspection. Costs of orders for (1854, s. 57). Effect of clause giving Judge discretion, where order is silent as to costs, 405. COSTS, I. 4.

7. Notice that a cause will be tried by a special jury (1852, s. 116). Sheriff not entitled to fees from party giving such notice, 683. SHERIFF, I.

II. Proceedings at trial.

Power of Judge to try question of fact by consent (1854, s. 1). Written consent not necessary where the decision of the issues is left by the parties to the Judge *at the time of trial.*

It appeared by the record that plaintiff and defendant pleaded to issue, and a jury venire went; and the postea stated that afterwards, at, &c., at the assizes then holden, &c., before Sir W. W., Justice of Q. B., and Sir C. C., Justice of C. B., "and other their fellow Justices assigned to take the assizes, in," &c., "come the parties," &c., "for the trial of the said issues. And thereupon, the said parties having, by consent of themselves, their attorneys and counsel, in open Court then given, left the decision of the said issues to the Court, it was ordered by Sir W. W., knight, one of the aforesaid Justices, that such trial should be allowed. And thereupon G. W. W. B., Esq., one of Her Majesty's counsel, and one other of the Justices aforesaid, did proceed to hold such trial, and did decide" certain of the issues, going to the whole cause of action, "within joined, in favour of the defendant, and" certain others "in favour of the plaintiff." Then followed judgment for the defendant, to go without day and recover his costs, and award of execution for such costs.

Held, in Exch. Ch., on error from Q. B., that the judgment appeared to be right, although there appeared no written consent as required in the case of a proceeding under sect. 1 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). *Andrewes* v. *Elliott*, 338

III. Proceedings after trial.

Appeal to Exch. Chamber against decision of Court below as to granting, discharging, or making absolute a rule nisi (1854, s. 41). Rule as to costs.

Where the Court of Exchequer Chamber, under sect. 41 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), reverses upon appeal the decision of the Court below as to granting, discharging, or making absolute a rule, the appellant is, as a general rule, entitled to such costs as he would have had if the decision in the Court below had been in his favour, but not to the costs of the appeal. *Young* v. *Moeller*, 681

See also 675. SHIP, II. 2.

IV. Proceedings in arbitration under the statute.

1. Stay of proceedings by Court, on the ground of a prior agreement to refer (1854, s. 11), 1020. Supra, I. 1.

2. Enlargement of time by arbitrator (1854, s. 15). Constructive consent of parties, 719. ARBITRATION, II. 1.

3. Remitter to arbitrator by Judge, for rehearing (1854, s. 8). To what references the power to remit applies, 383. ARBITRATION, II. 2.

COMPANY.

I. Powers of directors under deed of settlement, &c.

1. Of directors of a chartered Company to ratify verbal contracts, where the deed provides that all such contracts shall be signed by their directors, or sealed with the Company's seal, &c.

A company were incorporated by Royal charter for trading purposes. By the deed of settlement, the directors were to manage the business of the Company; but all contracts, above a certain value, were to be signed by at least three individual directors, or sealed with the seal of the Company under the authority of a special meeting.

Plaintiff sued the Company on an agreement above the prescribed value. It was within the scope of the Company's business, and was made by parol with the chairman, who, with his own hand, entered a memorandum of it in the minute book of the Company. It was recognised in correspondence with the secretary; plaintiff did work under it, and received payments by checks for it. These payments passed into the accounts of the Company, and were audited and allowed; but there never was any contract signed by three directors, or under the seal of the Company. On a case stating these facts, with power to draw inferences of fact,

Held, that the contract was ratified, if not authorized, by the Company, and binding. *Reuter* v. *Electric Telegraph Company*, 341

2. Of directors of a joint stock Company, registered under stat. 7 & 8 Vict. c. 110, to borrow money upon bond, under a general resolution of the Company. When such resolution may be presumed as against the Company. Whether the amount must be specified by such resolution.

Plaintiff declared against defendants, a joint stock Company completely registered under stat. 7 & 8 Vict. c. 110, on a bond, signed by two directors, under the seal of the Company, whereby the Company acknowledged themselves to be bound to plaintiff in 2000*l.*

The plea set out the condition, which ap-

peared to be for securing to the plaintiff, who was a banker, such sum as the Company should, to the amount of 1000*l.*, owe to plaintiff on the balance of the account current, from time to time, and for indemnifying plaintiff to that amount from losses incurred by reason of the account between plaintiff and defendants. The plea further set out clauses of the registered deed of settlement, by which it appeared that the directors were authorized, under certain circumstances, to give bills, notes, bonds, or mortgages: and one clause provided that the directors might borrow on bond such sums as should, from time to time, by a general resolution of the Company, be authorized to be borrowed. The plea averred that there had been no such resolution authorizing the making of the bond, and that it was given without the authority of the shareholders.

The replication set out the deed of settlement further, by which it appeared that the Company was formed for the purpose of carrying on mining operations and forming a railway.

On demurrers to the plea and replication, held, by the Court of Exchequer Chamber, affirming the judgment of Q. B., that plaintiff was entitled to judgment, the obligee having, on the facts alleged, a right to presume that there had been a resolution at a general meeting, authorizing the borrowing the money on bond.

Semble, per Jervis, C. J., that such resolution would confer sufficient authority if it authorised the borrowing on bond of such sums as the directors might deem expedient, in accordance with the statute and deed, without otherwise defining the amount. *Royal British Bank* v. *Turquand*, 327

II. Rights and liabilities of Companies as regards the shareholders.

1. What is a transfer, what a transmission of shares, within the Companies Clauses Consolidation Act, 1845.

The holder of shares in a railway company, whose Act incorporated the Companies Clauses Consolidation Act, 1845, conveyed the shares, along with much other property, by deed, in consideration of 10*s.* and the natural love and affection which he bore to his sister C., to a trustee in trust for her.

Held that this conveyance, though not a sale, was a transfer within the meaning of The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), sects. 14, 15, 16, and not a transmission within sects. 18, 19; and, consequently, that the trustee was not entitled to be registered as holder of the shares without delivering the deed to the secretary to be kept by him, as provided by sect. 15. *Copeland* v. *North Eastern Railway Company*, 277

2. Joint stock Company justified in refusing to register a memorial of a deed transferring shares, where the deed differed from the ordinary statutable form of conveyance.

A company incorporated under an Act containing clauses to the same effect as The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), were called upon to register a memorial of a deed conveying much other property, and also some shares in the Company, by way of mortgage. They refused to do so, on the ground that the deed was not to the like effect with the statutable form of transfer given by the Act. A rule Nisi for a mandamus having been obtained,

Held, that they were justified in refusing to register the deed, as it differed from the simple statutable form of conveyance. Rule discharged. *Regina* v. *General Cemetery Company*, 415

3. Action by joint stock Company for calls under the statute. What is a good plea of fraud.

Count by a joint stock Company against a shareholder, in the statutable form (7 & 8 Vict. c. 110, s. 55), for calls. Plea: that defendant was induced to become shareholder by the fraud of plaintiffs.

Held, a bad plea, as it did not show that defendant had ceased to be a shareholder, or, discovering the fraud, renounced the shares, and all benefit to be derived from them; and, therefore, admitted that he was still a shareholder. *Deposit Life Assurance* v. *Ayscough*, 761

III. Rights and liabilities of Company as regards strangers.

1. Judgment against a Joint Stock Company. Jurisdiction of Judge at chambers to order execution. Effect of Winding-up Acts as to suspension of execution against an individual shareholder.

Where judgment has been recovered against a joint stock company, a Judge of any Court sitting at Chambers has the same jurisdiction, under stat. 7 & 8 Vict. c. 110, s. 68, to order execution to issue against a shareholder as a Judge of the Court in which judgment was obtained.

Quære, whether the Court have a discretion, under any circumstances, to suspend execution against an individual shareholder on account of the pending of proceedings under the Winding-up Acts? *Palmer* v. *Justice Assurance Society*, 1015

2. Railway Company. Carriage of goods. What are "small" and "separate" "parcels," and "manufactured goods," under special Act. Effect of contract with agents to collect, 77. CARRIER.

IV. Rateability of Companies. See RATE.

COMPANIES CLAUSES CONSOLIDATION ACT.

(8 & 9 Vict. c. 16.)

Company, II. 1, 2.

COMPOSITION.

I. With creditors, and releases by them, under seal. Effect, as regards the right of a particular creditor, of the erroneous filling up, without his authority, and after execution of the deed by him, of a blank left in the deed for the insertion of the amount of his debt, 795. Deed, III. 1.

II. Resolution authorizing a composition for an annual rate imposed under The Nuisances Removal Act, how far illegal, 395. Rate, V.

CONDITION PRECEDENT.

I. Agreement by defendant to grant to plaintiffs a lease of certain land: defendant to repay to plaintiffs at the end of the term their expenses incurred in making roads and buildings on the said land. The granting the lease not a condition precedent to such repayment.

Declaration stated that, by contract between plaintiffs and defendant, defendant agreed to procure, as soon as possible and within four months from the making of the contract, sufficient land for a communication between a certain railway and certain gas works, and stowing a certain quantity of coals, "and to grant a lease of the same land to plaintiffs for a term of five years from the date of the said contract," determinable at the end of three years "of the said term" by notice from plaintiffs, which notice never was given; that plaintiffs should pay to defendant for the land half-yearly an annual rent equivalent to 4 per cent. on the money paid by defendant for the purchase, the first payment to be made six months after possession of the land should be given to plaintiffs, from which time only the rent was to run: and that, "upon the termination of the said term of five years, by effluxion of time or by notice," defendant should pay to plaintiffs all the moneys expended by them for laying down sidings for the communication, and building sheds and erections on the land for the purposes mentioned in the contract (less 5 per cent. for deterioration). Allegation: that, in part performance of the contract, defendant procured the land and put plaintiffs into possession; and that plaintiffs occupied and enjoyed the land from that time "until the termination of the said term of five years as hereinafter mentioned;" and, during the term they so occupied, &c., did, pursuant to the contract, expend money for laying down sidings, &c.; "that the said term of five years has expired and terminated, to wit, by effluxion of time;" that all things necessary had happened to entitle plaintiffs to receive from defendant, and render defendant liable to pay, the money expended (less, &c.): but defendant had not paid.

Plea: "That no lease of the said land was ever granted to the plaintiffs by the defendant, pursuant to the said agreement; nor did the said term of five years in the said agreement mentioned and contemplated ever come into, or have, any existence.

On demurrer: Held a bad plea. For that the granting of the lease by defendant was not a condition precedent to his liability to repay the money; and the meaning of the word "term" was not, in the agreement, restricted to a term created by lease, but included a period of five years during which the plaintiffs should occupy, after being put into possession under the contract. *Bowes* v. *Croll*, 255

II. Order by a third party, on defendant, to pay to plaintiff a sum of money, on a ship, chartered by defendant from such third party, "being load and sailed, out of the advance." The sailing held a condition precedent to the payment, 565. Ship, V.

CONDITIONS OF SALE.

Purchaser of an estate at a public auction precluded from repudiating the purchase on an objection excluded by conditions of sale, 659. Contract, VII. 5.

CONSENT.

I. Trial by Judge, without jury, by consent. Such consent, if given at the time of trial, need not be in writing, 338. Common Law Procedure Acts, II.

II. Consent of parties to an enlargement of time by arbitrator, when presumable, 719. Arbitration, II. 1.

III. Appeal by rate-payer against a proceeding of Commissioners under a local Act precluded, where he had given a general sanction to their proceedings, 218. Appeal, I. 2.

IV. Consent of committee, &c., to a borrowing by churchwarden for the purpose of church repairs, under church building Act, when presumable, 807. Rate, II. 2.

V. Contracts qualified by contemporaneous, or ratified by subsequent, consent of parties. See Contract, VII. IX.

CONTRACT.

(Of Insurance. See Insurance).

(By Charter-party. See Ship).

First. Contracts by corporations.

I. By Railway Company, as carriers, with agents for the purpose of collecting goods. How far it affects the Company's powers of charging persons whose goods are not so collected, 77. CARRIER.

II. By directors of a chartered company, in the course of the ordinary business of the Company. When ratification by the directors of a contract not according to the provision of the deed of settlement may be presumed, 341. COMPANY, I. 1.

III. By directors of a joint stock Company, under seal, securing a loan from, and the banking account with, the obligee. When a resolution of the directors, authorizing such security, may be presumed, 327. COMPANY, I. 2.

IV. By a joint stock Company with a shareholder. When fraud may be pleaded by the latter to an action for calls, 761. COMPANY, II. 3.

V. By a borough, with the county, under a local Act, for the maintenance of borough prisoners in the county gaol. What is a "special contract" within stat. 5 & 6 Vict. c. 98, s. 18, 246. GAOL.

VI. By Churchwardens, to secure a loan under Church Building Act. What is a "borrowing" within the Act; liability of rate-payers, 807. RATE, II. 2.

SECONDLY. Contracts by private individuals.

VII. Void and voidable contracts.

1. Between millowners, void for restraint of trade.

A bond was made by eighteen persons, in which each obligor was described as a cotton spinner of W. or of H., and by which each was bound to plaintiff in a separate sum of 500*l*. The condition recited that the obligors were respectively owners of spinning mills in W. and H., and employed in them many workpeople; that there were societies and combinations among divers persons, whereby persons, otherwise willing to be employed, were deterred by fear of social persecution and other injuries from hiring themselves to work, and whereby the legal control of the obligors of their property was injuriously interfered with; that these combinations were sustained by funds arbitrarily levied and extorted by way of tax or rate on the persons employed by and receiving wages from the obligors; and, in the opinion of the obligors, it had become necessary to take measures for vindicating their legal rights to the control of their property, which would also best sustain the rights of the labourer to the free disposal of his skill and industry: therefore the obligors had agreed to carry on their works, in regard to the amount of wages, the times of the engagement of workpeople, the hour of work, the suspending of work, and the general discipline and management of their works, in conformity to law, for twelve calendar months, in conformity with the resolutions of a majority of the obligors present at any meeting to be convened: that, for the purpose of carrying the agreement into effect, the obligors entered into the bond: and the condition was that, if the obligors, for twelve calendar months, should carry on, or wholly or partially suspend carrying on, their works, in regard to the matters aforesaid, in conformity with the resolutions of a majority of the obligors present at a meeting to be held as mentioned, then the bond, as to each person so performing, to be void; and the days, place, and other circumstances of the proposed meeting were set out; the obligor to hold the money recovered in trust for all the obligors; with power for a majority of the obligors present to release the obligors from performance.

An action being brought on this bond against one of the obligors, he, by plea, set out the bond and condition, and alleged that there was no consideration except as appeared by the condition.

On demurrer to the plea:

Held, by Lord Campbell, C. J., and Crompton, J., dissentiente Erle, J., that the bond was void as being in restraint of trade; and judgment was given in Q. B. for defendant.

Judgment affirmed in Exchequer Chamber. *Hilton* v. *Eckersley*, 47

2. Contract for payment in respect of a license to use a patent. Plea, that the letters patent were void. Held bad.

Action for a sum agreed to be paid to the plaintiff for each ton of an article manufactured and sold by the defendants by the permission of the plaintiff to them given at their request, the plaintiff having letters patent for the sole manufacture and sale of that article.

Plea: that the letters patent were void, and the defendants had a right to make and sell the article without plaintiff's permission. On demurrer:

Held, a bad plea; for, the invention having actually been used by the permission of the plaintiff, and there being no allegation of fraud, or of anything equivalent to eviction, the defendants were not at liberty to set up as a defence that the patent was void. *Lucas* v. *Purser*, 930

3. Contract to proceed to and load a cargo at a foreign port: under what circumstances the breaking out of war between England and that foreign country, within the time allowed for loading, avoids the contract, 953. SHIP, II. 3.

4. Contract between a Joint Stock Company and a shareholder. When fraud may be

pleaded by the latter to an action for calls, 761. COMPANY, II. 3.

5. Repudiation of contract by purchaser at a public auction: estoppel by conditions of sale.

Defendant became purchaser at public auction of a lot comprehending a freehold messuage and a fee farm rent of 21*s*. By the conditions of sale, no evidence was to be required of the receipt or payment or existence of the fee-farm rent, other than that disclosed by a certain conveyance; "nor should any objection be taken to the title in consequence of the non-payment or non-receipt" of the fee-farm rent. It was discovered that in fact the rent had not been paid or received for twenty years before the sale: and the purchaser contended that it was therefore extinguished under stat. 3 & 4 W. 4, c. 27, s. 34, and had ceased to exist at the time of the sale.

Held, that he was not entitled to repudiate the contract on this ground, but must be considered to have purchased, under the conditions of sale, the chance of the rent being obtainable. *Hanks* v. *Palling*, 659

6. Ratification, by directors of a joint stock Company, of a contract not made according to the regulations of the deed of settlement, 341. COMPANY, I. 1.

7. Ratification by principal of unauthorized contract by agent, 868. STATUTE OF FRAUDS, I.

8. Acceptance of goods sold, within sect. 17 of the Statute of Frauds, by the exercise of an act implying ownership on the part of the vendee, 726. STATUTE OF FRAUDS, II. 1.

9. Acceptanee of goods sold, held not within the Statute of Frauds, and invalid as against vendor, where contract previously disaffirmed by him, 765. STATUTE OF FRAUDS, II. 2.

VIII. Implied contracts.

1. By shippers of goods on board a general ship, not to ship goods of a dangerous nature, without notice to shipowner, 470. SHIP, II. 1.

2. Between proprietor of a hackney carriage and the party hiring it, 207. AGENT, I. 2.

3. By drawer of bill with drawee, that drawee would not accept and hand over to payee, unless drawee were able to honour on maturity, 742. BILLS OF EXCHANGE AND PROMISSORY NOTES, II.

IX. Qualified contracts.

1. Memorandum of agreement for sale. Evidence admissible to show that it was to be an agreement only upon a certain condition.

Action on an agreement for sale. Plea, Non assumpsit. On the trial plaintiff produced an agreement signed by defendant. Defendant gave evidence that plaintiff and defendant, having negotiated as to the purchase, agreed on the terms, and it was arranged that they and a third person, A., should meet, when, if A. approved of the property, they would make a bargain on these terms. At the meeting plaintiff did not attend till A. had gone. It was then arranged that plaintiff and defendant should draw up and sign a memorandum of an agreement of sale, but that it should not be a bargain until A., on being consulted, approved. A. did not approve. The Judge directed the jury to find for defendant if satisfied that it was arranged that the writing should be no agreement until A. approved.

Held, a right direction. *Pym* v. *Campbell*, 370

2. Implied contract at time of delivery of a deed, qualifying the character of such delivery, 986. DEED, III. 2.

X. Rights and liabilities on particular contracts.

1. Agreement to grant a lease of land, and repay to lessees at the end of the term their expenses incurred in making roads, &c., on such land. The granting of the lease not a condition precedent to such repayment, 255. CONDITION PRECEDENT, 1.

2. Right of assignees of a ship-builder, who had contracted, before his bankruptcy, to build a ship for a third party, to the unfixed materials of the ship, and of such third party to the unfinished body of the ship, 355. BANKRUPT AND INSOLVENT, III. 3.

3. Agreement by tenant not to carry on public business, &c. Construction of such covenant, 387. LANDLORD AND TENANT, VII.

4. Covenant by husband, under marriage settlement, to settle upon wife any personal estate afterwards acquired by him in right of her. How far a defence to an action by the husband against the wife's trustees for money had and received, 497. HUSBAND AND WIFE.

5. Contract by surety of County Court bailiff to indemnify high bailiff, 902. COUNTY COURT, II.

XI. Proceedings to enforce contracts.

1. Contract to refer to arbitration. When Court will stay proceedings in an action, upon the ground of such contract, 1020. ARBITRATION, I.

2. Mandamus to compel specific performance of contract. To what description of contracts this form of proceeding is applicable, 273. COMMON LAW PROCEDURE ACTS, I. 2.

3. Liquidated damages for breach of contract, when recoverable, 528. DAMAGES, II.

CONVERSION.

I. What amounts to a wrongful conversion by a creditor of an insolvent's goods before the insolvency, 1. BANKRUPT AND INSOLVENT, III. 1.

II. Trover or detinue lies, though not replevin, to recover plaintiff's goods, delivered to defendant by plaintiff's bailee, bonâ fide, with intent to give a lien against plaintiff which did not exist, 842. REPLEVIN, I.

CONVICTION.

By justices, under Act for Prevention of Cruelty to Animals (12 & 13 Vict. c. 92). In what cases an appeal lies, under sect. 25, 837. APPEAL, I. 1.

CORPORATION.

1. What are acts within the scope of corporate business; ratification by corporation of parol contracts for business not within such scope, 341. COMPANY, I. 1.

See, generally, COMPANY, I.

CORRUPT PRACTICES PREVENTION ACT. (17 & 18 VICT. c. 102.)

When a promise by a candidate to pay, or a payment by him of, the travelling expenses of a voter is, and when it is not, illegal.

Two counts for penalties under The Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102): one for promising money to an elector to induce him to vote at an election; and the other for corruptly giving him money on account of having voted at the election. Plea: Not guilty, by statute. Verdict for plaintiff, subject to an exception that there was no evidence to go to the jury. On the bill of exceptions the evidence was set out: by which it appeared that defendant, S., was a candidate at a contested election for a borough, standing with M. A witness, T., gave evidence that he was in S. & M.'s committee room when there was a discussion about travelling expenses; that defendant's agent for election expenses asked defendant whether it would be legal to pay travelling expenses to bring up the outvoters; defendant answered it would be legal to pay what the voters paid out of pocket. Thereupon T. wrote to C., an outvoter, asking him to come up and vote for S. and M., adding, "your railway expenses will be paid." C. came, and voted for S. and M.; and his expenses were paid by the election auditor, on the voucher of defendant's election agent, written on T.'s letter.

Held, by the Exchequer Chamber, that a promise to pay travelling expenses, conditioned on the voter voting in a particular manner, was an offence within the Act, and that actual payment in pursuance of such a promise to pay was corrupt and an offence within the Act; but that payment of such expenses, without any such condition, was not illegal: and that there was in this case no evidence to go to the jury that the defendant authorized a promise to pay the expenses of those outvoters only who should vote for him. Venire de novo awarded. Williams, J., dissentiente, on the ground that there was some evidence of a promise conditioned on the voter voting in the particular manner. *Cooper* v. *Slade*, 447

COSTS.

I. Right to costs.

1. Interpleader issue, decided partly for plaintiff, partly for defendant. How costs are to be taxed.

C. claimed property seized under a fi. fa. in an action of D. against A. The sheriff having applied under stat. 1 & 2 W. 4, c. 58, s. 6, a Judge ordered an issue to try C.'s right, C. to be plaintiff, D. defendant. By the verdict, C.'s claim was affirmed for more than five-sixths, but negatived as to the residue. The Court directed the costs to be taxed upon the principle of each party having succeeded as to a part, without reference to the fact which was plaintiff and which defendant. *Clifton* v. *Davis*, 352

2. Costs of action ordered to abide the event of the award. When plaintiff entitled to them under the award.

By order of Nisi Prius, a cause and all matters in difference were referred to an arbitrator, who was empowered to direct a verdict for plaintiff or defendant, or a nonsuit; the costs of the action to abide the event of the award.

The arbitrator directed that a verdict should stand for plaintiff, for substantial damages which he adjudged to be due from defendant to plaintiff, and that certain lamps, in respect of which plaintiff made a claim for damages in the declaration, should be delivered up to defendant.

Held, that plaintiff was entitled to the costs of the action. *Matlock Gas Company* v. *Peters*, 215

3. Confirmation by Exchequer Chamber, upon appeal, of the decision of the Court below as to granting, discharging, or making absolute a rule (under Common Law Procedure Act). Who is liable for costs of the appeal and the proceedings below, 661. COMMON LAW PROCEDURE ACTS, III. See also 675. SHIP, II. 2.

4. Costs of orders for interrogatories and inspection of documents (under Common Law Procedure Act, 1854); when costs in the cause.

The costs of orders for interrogating the opposite party, and for the inspection of documents under The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), are, by sect. 57, in the discretion of the Judge making the order. If the order is silent, they will not be allowed as costs in the cause for the interrogating party, though he is successful. *Smith* v. *Great Western Railway Company*, 405

II. Taxation of costs.

1. Attorney's bill. Deduction of additions allowed by master from amount taxed off. When the attorney is liable to pay costs of taxation.

A client of an attorney having applied to have the attorney's bill taxed, the Master taxed off a certain amount, but deducted from this amount certain additions which he allowed to the bill. After this deduction, the sum taxed off was reduced to less than a sixth of the bill delivered. But, if the sum at first taxed off had been compared with the amount in the bill delivered (even augmented by the additions allowed), the deduction would have been more than one-sixth.

Held: that the sum taxed off ought not to have been reduced by the addition allowed; and that the costs of the taxation were to be paid by the attorney, under stat. 6 & 7 Vict. c. 73, s. 37. *Regina* v. *Eastwood*, 285

2. Disallowance by Poor Law auditor of an untaxed attorney's bill, under stat. 7 & 8 Vict. c. 101, s. 39, final as against the overseers, 408. CERTIORARI, III.

III. Costs of conviction by justices.

Act for Prevention of Cruelty to Animals (12 & 13 Vict. c. 92). What amount of penalty, exclusive of costs, entitles the party convicted to an appeal, 837. APPEAL, I. 1.

COUNTY.

Contract between a borough and the county, under a local act, for the maintenance of the borough prisoners in the county gaol. What is a "special contract" within stat. 5 & 6 Vict. c. 98, s. 18, 246. GAOL.

COUNTY COURT.

I. Replevin bond, under stat. 9 & 10 Vict. c. 95. When forfeited by suit not being prosecuted with effect, 571. REPLEVIN, II.

II. Bond by sureties of county court bailiff, to indemnify high bailiff. Effect of the recent County Court Acts as to liability of sureties.

A bond was executed by G. and two sureties conditioned for indemnifying the high bailiff of a county court against liabilities from the misconduct in his office of G., who was appointed by the high bailiff one of the bailiffs. At the time the bond was executed, the jurisdiction of the county court was regulated by stat. 9 & 10 Vict. c. 95. After the execution of the bond, the jurisdiction of the county court was extended, and increased by stat. 10 & 11 Vict. c. 102, stat. 12 & 13 Vict. c. 101, stat. 13 & 14 Vict. c. 61, and stat. 14 & 15 Vict. c. 52.

Held, that these statutes had so materially altered the nature of the office of bailiff that the sureties were no longer liable to indemnify the high bailiff, even though the misconduct of G. was in respect of a matter within the jurisdiction conferred by stat. 9 & 10 Vict. c. 95, in respect of which the duty of the bailiff was not altered by the subsequent Acts. *Pybus* v. *Gibb*, 902

COVENANT.

I. By millowners, to carry on business according to the resolution of a majority; bad for restraint of trade, 47. CONTRACT, VII. 1.

II. By tenant, not to carry on any public business, &c. What is a breach, 387. LANDLORD AND TENANT, VII.

III. By husband, under marriage settlement, to settle on wife any personal estate acquired afterwards in her right. How far a defence to an action by husband against wife's trustees, for money had and received, 497. HUSBAND AND WIFE.

IV. Liquidated damages for breach of covenant, when recoverable, 528. DAMAGES, II.

CROSS ACTIONS.

Stay of, by Court, on the ground of previous agreement to refer, 1020. ARBITRATION, I. 1.

CROSS DEMANDS.

See SET-OFF.

DAMAGES.

I. Agreement by a shipbuilder, before his bankruptcy, to build a ship for plaintiff, which was unfinished at the time of the bankruptcy. For what matters plaintiff entitled to recover damages, in an action against the assignees, 355. BANKRUPT AND INSOLVENT, III. 3.

II. Liquidated damages for breach of covenant, when recoverable.

Deed between plaintiff and defendant recited that plaintiff and defendant had carried on the business of surgeons and apothe-

caries in partnership in W.: and each covenanted that the business should thereafter be carried on under the style of the old firm for three years, but should be the exclusive business of plaintiff: then followed other covenants to be performed by plaintiff and defendant respectively: and then a covenant that, after the determination of the three years, and so long as plaintiff should reside in W. or within twelve miles thereof, defendant should not practise the business of a surgeon or apothecary, or see any patients, except as thereafter mentioned, nor assist nor introduce any other medical man in W. or within twelve miles thereof, but should, before the expiration of the three years, introduce plaintiff to all such persons as might be the exclusive patients of defendant, and, during the term of three years, use his best endeavours to secure the same for plaintiff after the expiration of the three years; provided that, in case defendant should make default in the observance and performance of the covenant lastly mentioned, defendant should forthwith pay to plaintiff 2000*l.*, but not in the nature of a penalty, but as ascertained liquidated damages; but that defendant might, after the determination of the three years, act in consultation with other medical gentlemen in W. and elsewhere, and might also, if he thought fit, after the determination, &c., attend midwifery cases in W., the fees for which should be equal to or exceed 1*l.* 1*s.*; but he should pay one-half of the fees he should receive for each of such midwifery cases to plaintiff, so long as plaintiff should continue to practise at W. That, in case either party should make default in performance of any covenant, he should pay to the other 500*l.*, as and for liquidated damages, and not in the nature of a penalty. Defendant committed a breach by practising contrary to the covenant.

Held, that the 2000*l.* was recoverable as liquidated damages, no one of the provisions of the covenant to which it applied being such that the damage for the breach of it was capable of precise estimation; the provision as to the payment of the half fee not being a part of such covenant, but collateral to it. *Reynolds* v. *Bridge*, 528

DEBT.

I. Release by A. to B. of B.'s debt to A.; A. owing at the time a lesser sum to B. What is the "debt" released, 795. Deed, III. 1.

II. What are "mutual debts" within stat. 2 G. 2, c. 22, s. 13, 976. Set-off, II.

DEBTOR (INSOLVENT).

See Bankrupt and Insolvent.

DECLARATION.

See Pleading, I.

DECLARATION OF WAR.

Contract to proceed to and load a cargo at a foreign port. Under what circumstances the breaking out of war avoids the contract, 953. Ship, II. 3.

DEEDS.

First, Statutory deeds.

I. Deed of settlement.

1. Deed of settlement of a chartered Company, empowering directors to borrow such sums as should be authorized by a general resolution of the Company. What is the proper form of such resolution, 327. Company, I. 2.

2. Ratification by directors of contracts not made according to the provisions of deed of settlement, 341. Company, I. 1.

II. Deed of transfer.

1. What is a transfer, what a transmission, within the Companies Clauses Consolidation Act, 277. Company, II. 1.

2. What description of deed, assigning shares in a joint stock company, the Company are bound to register under provisions similar to those of the Companies Clauses Consolidation Act, 415. Company, II. 2.

Secondly, Ordinary deeds.

III. Execution and delivery.

1. Effect of a blank being filled up after execution, erroneously and without the authority of the obligor.

To action against the acceptor of a bill of exchange for 337*l.*, defendant pleaded a release by deed. Plaintiff replied: 1. Non est factum; 2. That a blank was left in the deed for plaintiff's debt, which, after execution of the deed by plaintiff, was filled up erroneously, without plaintiff's authority.

The evidence was that, after the acceptance, plaintiff became indebted to defendant in 142*l.* for goods sold. That afterwards plaintiff signed the deed, which recited that defendant was indebted to certain persons parties thereto, in the sums set opposite to their names in the schedule; and in consideration of a guarantee of 10*s.* in the pound by a third party, the creditors parties thereto released the debts then owing to them. Plaintiff executed the deed; but a blank was left opposite to his name, which afterwards, without his authority, was filled up with the sum of 337*l.* The jury found that the debt which the parties meant to be released was the balance after deducting the 142*l.* from the 337*l.*

Held that, on these facts, plaintiff was

entitled to a verdict on the issues on both replications. *Fazakerly* v. *M'Knight*, 795

2. When evidence admissible that deed was delivered as an escrow.

G. having agreed to let premises to P. for a term of years, P. paying 100*l.* for the fixtures, a lease by deed was prepared, and engrossed on parchment. B. paid down only 50*l.*: it was agreed between G. and P. that P. should be let into possession as tenant from year to year on the terms of the intended lease until he paid the balance of the 100*l.* At the same time G. signed, sealed, and delivered the deed, which however he retained in his own possession. No third person was present. No words qualifying the delivery, or expressly stating that it was as an escrow till the payment of the balance, appeared to have been used. G. brought use and occupation against the assignee of P.'s interest: and, on those facts appearing at the trial, an objection was taken that the action ought to have been on the covenants in the deed.

Held: that the circumstances warranted an inference in fact that it was agreed by both G. and P., at the time of the execution of the instrument, that it should not operate as a lease until the payment; and that, if there was such an agreement by both, though no express words of delivery as an escrow were used, it would not operate as a deed till then; and, consequently, P. was tenant from year to year under the terms in the instrument, and not tenant under a deed: and that the action for use and occupation would lie against him or the assignee of his interest. *Gudgen* v. *Besset*, 986

IV. Registration. What is a bill of sale of "personal chattels," so as to require registration under stat. 17 & 18 Vict. c. 36, 876. BANKRUPT AND INSOLVENT, III. 4.

See also, generally, COVENANT.

DEED OF SETTLEMENT.

See COMPANY, I.

DELIVERY.

I. Of deed as an escrow: when parol evidence to that effect is admissible, 986. DEED, III. 2.

II. Delivery and acceptance of part of goods, within sect. 17 of the Statute of Frauds. See STATUTE OF FRAUDS, II.

DEMURRER.

See PLEADING.

DESCRIPTION.

I. Of property in a voting paper, under the Municipal Corporation Reform Act. What is a sufficient description: what misdescription is curable under sect. 142, 363. MUNICIPAL CORPORATION REFORM ACT, I.

II. Of the tonnage of a ship in a charter-party; when not a warranty of such tonnage, 675. SHIP, II. 2.

DETINUE.

Lies to recover plaintiff's goods, delivered to defendant by plaintiff's bailee, bonâ fide, with intent to give a lien against plaintiff, which did not exist, 842. REPLEVIN, I.

DEVISE.

I. Estate of trustees. Outstanding term.

Testator, in 1794, devised lands at H. to trustees and their heirs, in trust for the use of his daughter for life, and after her decease upon trust and to the use of the heirs of her body, remainders over; and that, if his daughter should marry, her husband should not meddle, and her receipts should be sufficient discharges to the trustees. After bequeathing certain legacies, to be paid twelve months after his decease, testator bequeathed all his personal estate to the said trustees, in trust to sell and apply the proceeds to the payment of the said legacies and of his debts, so far as the same would extend. He then devised as follows: "I do hereby order and direct, that the surplus of the rents and profits of my real estates by me hereinabove devised, over and above what shall be laid out" by the said trustees in maintenance of my said daughter during her minority, shall be applied during her minority "in and towards further payment of the said" several legacies and debts; "and in case the provisions by me above made" for the payment of the legacies and debts "be insufficient for that purpose," "I do hereby charge all and singular the said lands" &c. "at H. aforesaid with and to the payment of such deficiency." "And also that it shall and may be lawful for" the trustees, "by and out of the same premises hereby devised to them respectively, to deduct and reimburse him and themselves respectively all such loss, costs, charges, and expenses as he or they or any of them shall pay, sustain, expend, or be put unto for or by reason of the performance of this my will, or the trusts hereby in them reposed, or the management and execution thereof respectively, or any other thing in anywise relating thereto."

The trustees, finding 300*l.* due to them on their trust account, borrowed that sum, and, in 1802, mortgaged the lands at H. for the term of one thousand years, by way of security. This was paid off in 1803, but the term was never surrendered.

In 1842, the daughter and her husband mortgaged the premises; and the term of 1802 was assigned in trust for the mortgagee. The daughter having died, her son and heir-at-law brought ejectment.

Held, by the Queen's Bench, that the legal estate was in the trustees under the will, and, consequently, that the plaintiff's action failed.

Held, by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that the legal estate was not in the plaintiff: Williams, J., grounding his judgment, not specially on the estate being in the trustees, but generally on the existence of the term. *Poad* v. *Watson*, 606

II. Devise to A., and "the heir male of his body," &c., "and the heirs and assigns of such heir male for ever," &c.

Devise of freeholds to A., "to hold to him and the heir male of his body lawfully begotten, and the heirs and assigns of such heir male for ever;" "but, in case" A. "shall happen to die without leaving any son of his body lawfully begotten," then to B. "his heirs and assigns for ever," subject to the payment by B. of 300*l.* to the daughters of A., or such of them as should be living at his decease."

Held, in the Exch. Ch. affirming the judgment of Q. B., that A. took an estate for life, with contingent remainder in fee to such heir male of A. as should be living at the time of his decease; and, failing such heir, to B. in fee. *Chamberlayne* v. *Chamberlayne*, 625

DIOCESE.

Commission issued by Archbishop of Canterbury, under the Church Discipline Act, against an incumbent of a living in the gift of the Bishop of B. Held, that the appearance and hearing must be within the diocese of B., 546. Church Discipline Act.

DIRECTORS.

See Company, I.

DISCOVERY.

To what kind of discovery s. 51 of the Common Law Procedure Act, 1854, giving power to administer interrogatories, applies, 462. Common Law Procedure Acts, I. 5.

DISCHARGE.

By Insolvency Court. On what terms the Court of Queen's Bench will set aside the outlawry of an insolvent finally discharged, 376. Bankrupt and Insolvent, II.

DISTANCES.

How to be measured, under Turnpike Acts, 350. Turnpike, I.

EASEMENT.

Qualified easement for support in the allottee of the surface, 593. Mine, I.

ELECTION.

I. Parliamentary. When a promise by a candidate to pay, or payment by him of, a voter's travelling expenses amounts to bribery, within the Corrupt Practices Prevention Act, 447. Corrupt Practices Prevention Act.

II. Of vestrymen, under stat. 18 & 19 Vict. c. 120. Action for rejection of plaintiff's vote; plea that a rate was then unpaid by plaintiff: replication that vote was void, &c., 289. Rate, II. 1.

III. Of councillors, under Municipal Corporation Reform Act. What misdescription in the voting paper is curable under sect. 142: what is a sufficient description, 363. Municipal Corporation Reform Act, I.

IV. Of a local board of health, under the Public Health Act, 1848.

1. Discretion of board as to what is a reasonable remuneration to the person conducting the first election, 287. Public Health Act, II. 1.

2. What is a proper election of new members, under sects. 13, 18; 736. Public Health Act, II. 2.

V. Of surveyors of highways, under the General Highway Act. Who are entitled to vote, 999. Highway, I.

EMPLOYER.

I. Within the meaning of the Truck Act, what is, 584. Truck Act.

II. Combination by employers to carry on trade according to the resolution of a majority, when illegal, 47. Contract, VII. 1.

See also, generally, Agent.

ENCLOSURE.

I. Qualified right of support in allottee of surface under an enclosure Act, as against allottee of minerals, 593. Mine, I.

II. Right of support in allottee of surface, under an enclosure Act, as against lord of the manor, 643. Mine, II.

ENDORSEMENT.

Of bill of exchange. Endorsee, admitting his endorsement to plaintiff, estopped from deny-

ing previous endorsement to himself, 266. BILLS OF EXCHANGE AND PROMISSORY NOTES, III.

ENLARGEMENT OF TIME.

By arbitrator, in a compulsory reference under the Common Law Procedure Act, 1854. Consent of parties, when presumable, 719. ARBITRATION, II. 1.

ENTAIL.

DEVISE, II.

EQUITABLE ASSIGNMENT.

ASSIGNMENT, II.

EQUITABLE PLEA.

By trustees of wife, in an action by husband for money had and received; that by marriage settlement the husband covenanted to settle personal estate subsequently acquired in right of wife in trustees to her use. Held not to apply to money bequeathed to wife's separate use, 497. HUSBAND AND WIFE.

ERROR.

Confirmation by Exchequer Chamber of decision of Court below (on appeal under Common Law Procedure Act, 1854), as to granting, discharging, or making absolute a rule. Right to costs, 681. COMMON LAW PROCEDURE ACTS, 1854, III. See also, 675, SHIP, II. 2.

ESCROW.

When evidence admissible to show that deed delivered as escrow, 986. DEED, III. 2.

ESTATE.

See DEVISE.

ESTOPPEL.

I. Endorsee of bill of exchange, admitting his endorsement to plaintiff, estopped from denying previous endorsement to himself, 266. BILLS OF EXCHANGE AND PROMISSORY NOTES, III.

II. Action for money agreed to be paid by defendants in respect of goods manufactured and sold by them under plaintiff's patent. The patent having been actually so used by them, defendants estopped from denying validity of patent, 930. CONTRACT, VII. 2.

III. Rate-payer, precluded from appealing as "aggrieved," within the section of a local Act giving appeal in such case, against a proceeding under the Act which he had impliedly sanctioned, 218. APPEAL, I. 2.

IV. Compulsory reference under Common Law Procedure Act, 1854. Parties estopped from denying their consent to an enlargement of time by the arbitrator, where they have, after the expiration of the original time, acted upon the reference as still subsisting, 719. ARBITRATION, II. 1.

V. Purchaser at an auction precluded from repudiating purchase on a ground of objection excluded by the conditions of sale, 659. CONTRACT, VII. 5.

EVIDENCE.

I. Generally. What is the meaning of there being "*no* evidence" to go to the jury, 953, 973. SHIP, II. 3.

II. When oral evidence admissible to qualify the effect of a written document.

1. Evidence to show that a memorandum of an agreement of sale was, by the consent of both parties to it, to be no complete bargain until approved of by a third party, 370. CONTRACT, IX. 1.

2. Evidence to show that a deed was delivered as an escrow, 986. DEED, III. 2.

III. When not so admissible.

Evidence of an intention to insure in a manner different from that appearing on the face of the policy, 312. INSURANCE, II.

IV. Documentary evidence; its effect in particular cases.

1. Affidavits. When admissible as showing the true meaning of a complaint before justices, 137, 155. See BUILDING ACT.

2. Adjudication of Insolvency Court, discharging debtor, and stating the cause of his detainer to have been a warrant of attorney given by him by way of fraudulent preference; for what purpose admissible, 1. BANKRUPT AND INSOLVENT, III. 1.

V. Evidence in particular actions.

1. Contract, by charter-party, that defendant should load a cargo on board a ship of plaintiff's at a foreign port. What renunciation on behalf of defendant amounts to a dispensation by him, 953. SHIP, II. 3.

2. Acceptance of a bill of exchange on account, held evidence of a fresh promise, so as to take the whole debt out of the Statute of Limitations, 506. STATUTE OF LIMITATIONS.

3. Action for bribery at a parliamentary election. What is evidence for the jury of a promise by the candidate to pay the travelling expenses of voters, 447. CORRUPT PRACTICES PREVENTION ACT.

4. Action for malicious prosecution. What is evidence of reasonable and probable cause: how that question is to be left to the jury.

In an action for a malicious prosecution for sheep stealing, it appeared at the trial that plaintiff was possessed of a sheep which defendant claimed as one of a lot stolen from him. Plaintiff gave an account of the way he became possessed of it, which, if the sheep was defendant's, must have been wilfully false. Defendant took away the sheep. Plaintiff sued him for so doing in the county court. To stop the action defendant indicted plaintiff, who was acquitted. There was evidence both ways; but it appeared that the sheep really never was defendant's, though defendant bonâ fide believed it was. The judge, assuming these facts to be true, asked the jury if the defendant had reasonable grounds for his belief. On their finding that he had, he ruled that there was reasonable and probable cause for the indictment.

Held, by Coleridge and Crompton, Js., that, under these circumstance, the finding of the jury on that one point, in addition to the facts beyond dispute, made out a complete case of reasonable and probable cause, and, therefore, that the judge was right.

Erle, J., dissentiente. *Douglas* v. *Corbett*, 511

5. Action for running down plaintiff's ship. How far the question whether she was "close haulod" is for the jury, 771. Merchant Shipping Act.

6. Colourable action, brought for the purpose of obtaining inspection of documents necessary for plaintiff's case in an action against another party. Rule for inspection refused, 380. Common Law Procedure Acts, I. 5.

EXECUTION.

I. Of a deed. See Deed, III.

II. Of fi. fa. Liability of sheriff's officer for an overcharge; not destroyed by custom in particular county, 718. Sheriff, II.

EXECUTOR.

What claims can be set off by an executor, sued as such, against a debt due to plaintiff from testator in his lifetime, 976. Set-off, II.

EXPENSES.

Travelling expenses of voters. When a promise by the candidate to pay them, or an actual payment by him, is, and when it is not, illegal, 447. Corrupt Practices Prevention Act.

FORFEITURE.

Of replevin bond, under stat. 9 & 10 Vict. c. 95, s. 1. What is prosecuting "with effect," 571. Replevin, II.

FRAUD.

I. Allegation of, not necessary, in an action by shipowner against shipper for shipping goods of a dangerous nature, without the knowledge of the plaintiffs, 470. Ship, II. 1.

II. Plea of, to an action for calls, when bad, 761. Company, II. 3.

FRAUDS, STATUTE OF.

Statute of Frauds.

FRAUDULENT ASSIGNMENT.

I. What is.

Warrant of attorney void within stat. 1 & 2 Vict. c. 110, s. 59, 1. Bankrupt and Insolvent, III. 1.

II. What is not.

A bill of sale given as security for fresh advances only, 296. Bankrupt and Insolvent, I.

FRAUDULENT PREFERENCE.

See Assignment, III.

FREEHOLD.

What fixtures, though to some extent attached to the soil, are still "personal chattels" within stat. 17 & 18 Vict. c. 36, s. 7, and do not therefore pass with the freehold, 876. Bankrupt and Insolvent, III. 4.

FREIGHT.

Right to, the bill of lading having been signed by the master as agent for the charterers, 232. Bill of Lading, I.

See, generally, Ship.

GAOL.

Local Act, providing for maintenance of borough prisoners in County Gaol. What is a "special contract" within stat. 5 & 6 Vict. c. 98, s. 18.

By a local Act passed prior to stat. 5 & 6 Vict. c. 98, in furtherance of arrangements made between the justices of a county and the council of a borough, having a separate Court of Quarter Sessions, it was provided that the prisoners of the borough should be maintained in the county gaol on certain terms.

Held, that this Act was not a special contract within the meaning of stat. 5 & 6 Vict. c. 98, s. 18; and that the local Act, being inconsistent with the general enactment, was repealed by it, though not expressly mentioned. *Bramston* v. *Mayor of Colchester*, 24[illegible]

GENERAL LIGHTING ACT.

Sect. 165 of Metropolis Local Management Act, 18 & 19 Vict. c. 120, provides a certain scale of lighting rates for parishes in which the General Lighting Act should be then in force. What is the meaning of "owners and occupiers of houses, buildings, and property, other than land," in that section, 1008. RATE, IV.

GOODS.

I. Carriage of, by Railway Company. What are "manufactured goods," within the meaning of the Special Act. Right of Company as to rates of charge, 77. CARRIER.

II. Shipment of dangerous goods on board a general ship. Liability of shipper to shipowner, 470. SHIP, II. 1.

III. Liability of shipowner, for damage caused by goods of one party to goods of another, 477, note (*b*). SHIP, III. 1.

HACKNEY CARRIAGE.

Liability of proprietor for loss of luggage through negligence of driver, 207. AGENT, I. 2.

HEIR.

Effect of a devise to A. "and the heir male of his body," "and the heirs and assigns of such heir male for ever," &c., 625. DEVISE, II.

HIGH BAILIFF.

Indemnity bond to, by sureties of bailiff. Liality of sureties, 902. COUNTY COURT, II.

HIGHWAY.

I. General Highway Act, 5 & 6 Vict. c. 50. Election of surveyors. Who are entitled to vote.

The occupiers of property in a parish in respect of which they are liable to be rated to the highway rate are entitled, under stat. 5 & 6 W. 4, c. 50, s. 6, to vote at the election of surveyors; though they are not actually rated to the last highway rate. *Regina* v. *Kershaw*, 999

II. Maintenance of highways, under Public Health Act. What form of rate is to be imposed upon a statutory district, comprising parishes separately maintaining their own highways.

Where several parishes or places separately maintaining their own highways are comprised in the district assigned to a Local Board of Health, the highways throughout the district are, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), sect. 87, to be maintained by a general district rate, and not by separate highway rates on the ancient divisions. *Mosely* v. *Ely Local Board of Health*, 518

III. Provisional order of Board of Health, incorporating clause in Towns Improvement Act, abolishing tolls on all highways in a district, how far invalid, 114. PUBLIC HEALTH ACT, I.

IV. How distances are to be measured, under Turnpike Acts, 350. TURNPIKE, I.

HIRING.

Of a hackney carriage. The registered proprietor liable for loss of luggage through the negligence of driver, 207. AGENT, I. 2.

HUSBAND AND WIFE.

Action by husband, for money had and received, against trustee of wife. Equitable pleadings.

Count for money had and received. Plea, by way of defence on equitable grounds: that the money had been bequeathed by will to the separate use of plaintiff's late wife, who, during the coverture, assigned the money to the defendant, on trusts in which plaintiff took no interest. Replication, on equitable grounds to this plea: that, before the assignment, plaintiff's wife had assigned the money to plaintiff, and that the receipt by defendant was as agent for the wife, in order to give a discharge to the executors.

Held, that the plea was good, admitting a receipt of the money, primâ facie to the use of the husband, and avoiding it by showing that in equity the receipt was on trusts in which the husband took no interest; thereby sufficiently negativing any marital right arising on her death.

Held, also, that the replication was good, as showing a previous equitable assignment for the plaintiff's benefit.

There was also a plea, by way of defence on equitable grounds: that by marriage-settlement the plaintiff covenanted to settle any personal estate he might acquire in his wife's right: and that this money was bequeathed to her separate use.

Held, that this plea was bad: such a covenant not applying to money bequeathed to the separate use of the wife. *Sloper* v. *Cottrell*, 497

ILLEGALITY.

I. Bond by millowners, agreeing to carry on business according to the resolution of the majority, void for illegality, 47. CONTRACT, VII.

II. Promise by candidate at a Parliamentary election to pay the travelling expenses of a

INTERPLEADER.

Interpleader issue, decided partly for plaintiff, partly for defendant. How costs to be taxed, 392. Costs, I. 1.

INTERROGATORIES.

Under Common Law Procedure Act, 1854.

I. To what kind of discovery the cause giving power to interrogate applies, 462. Common Law Procedure Acts, I. 5.

II. Costs of orders for. Effect of clause giving judge discretion, 405. Costs, I. 4.

JOINT STOCK COMPANY.

See Company.

JOINT STOCK COMPANIES' REGISTRATION ACT.

(7 & 8 Vict. c. 110.)

See Company.

JUDGE.

I. Trial before, without a jury. When written consent of parties necessary, 338. Common Law Procedure Acts, II.

II. At chambers. Jurisdiction to order execution against a shareholder of a joint stock company, 1015. Company, III. 1.

III. Certificate by Judge, that there was sufficient reason for bringing action in superior court. At what time it may be given and endorsed on the record, 683. Sheriff, I.

JUDGMENT.

I. Upon a warrant of attorney, pleaded to an action of trover by assignee against creditor of bankrupt. When the issuing of execution upon a judgment on a warrant of attorney fraudulently given amounts to a conversion before the insolvency, 1. Bankrupt and Insolvent, III. 1.

II. Signed on an award. Cannot be set aside on the ground that arbitrator enlarged the time without consent of parties, where parties have, since such enlargement, acted on the reference as still subsisting, 719. Arbitration, II. 1.

JURISDICTION.

I. Of the Superior Courts.

1. Claim of mandamus, under Common Law Procedure Act, 1854. What kind of obligations can be enforced by that remedy, 273. Common Law Procedure Acts, I. 2.

2. A mandamus cannot issue to compel a local board of health to pay a reasonable remuneration to the person conducting the first election of the board, 287. Public Health Act, II. 1.

3. Judgment against a shareholder of a joint stock Company. Jurisdiction of a Judge at chambers to issue execution, 1015. Company, III. 1.

4. Trial of issue by Judge, without a jury, under Common Law Procedure Act, 1854. When written consent of parties necessary, 338. Common Law Procedure Acts, II.

5. Certificate of Judge that there was sufficient reason for trying the action in a superior Court; at what time it may be endorsed on the record, 683. Sheriff, I.

II. Of the County Courts.

Liability of sureties of a County Court bailiff, under an indemnity bond to the high bailiff; how affected by the recent increase of the jurisdiction of the Courts, 902. County Court, II.

III. Of Quarter Sessions.

1. Sessions bound to enter and respite an appeal against a poor-rate, for want of notice to the proper parties, 992. Appeal, II.

2. Power of Sessions, under stat. 16 & 17 Vict. c. 97, s. 112, to amend copy of order and particulars of settlement of a pauper lunatic, by adding description and address of guardians, 919. Poor, I. 2.

3. Appointment of inspector of weights and measures for a district; under what circumstances the right to appoint is in the Quarter Sessions.

Plaintiff was appointed, by the justices of the county of S. in Quarter Sessions, inspector of weights and measures, for a district comprising the town of B. Subsequently the town of B. was incorporated, and obtained a grant of a separate court of quarter sessions. The recorder of B., in Quarter Sessions for B., appointed defendant inspector of weights and measures. The justices for the borough of B. in petty sessions appointed the plaintiff inspector.

On a case stated without pleadings, in which the question was whether the appointment was in the Recorder in Quarter Sessions, or the justices of the borough in petty sessions:

Held, that it was in neither, but in the Quarter Sessions for the county of S., in virtue of whose appointment the plaintiff recovered. *Duly* v. *Sharwood*, 850

4. In what cases Quarter Sessions have jurisdiction to fine or discharge a surveyor under the Building Act, 137. Building Act.

IV. Of justices.

1. Order by justices of Middlesex for binding

a pauper apprentice. What amount of jurisdiction must appear upon the face of the order, when made within the limits of the Metropolitan Police District.

An order for binding a pauper child apprentice, under stat. 56 G. 3, c. 139, purported to be made by "two justices for the county of Middlesex," and to be signed and sealed by them at "the Police Office, Hatton Garden."

In the Metropolitan Police Act (10 G. 4, c. 44) "Hatton Garden" is mentioned as one of the places in Middlesex forming the Holborn division of the Metropolitan Police District.

Held, that jurisdiction sufficiently appeared on the face of the order, as the Court would take judicial notice from the act that Hatton Garden was in Middlesex. *Regina* v. *Guardians of Holborn Union*, 715

2. What is a proper service of a summons of affiliation, so as to give the justices in petty sessions jurisdiction to make an order, 822. BASTARDY.

V. Of Local Boards of Health.

Discretion of board as to what is a reasonable remuneration to the person conducting the first election, 287. PUBLIC HEALTH ACT.

VI. Of arbitrators.

Enlargement of time by arbitrator appointed under a compulsory reference. When parties estopped from disputing award on the ground that no written consent had been given by them to such enlargement, 719. ARBITRATION, II. 1.

VII. Of Poor Law auditors.

Finality of auditor's decision, in disallowing items in an attorney's bill, 408. CERTIORARI, III.

JURY.

I. Trial by Judge, without a jury, under Common Law Procedure Act, 1854. When written consent of parties necessary, 338. COMMON LAW PROCEDURE ACT, III.

II. Notice, under Common Law Procedure Act, 1852, that a cause is to be tried by special jury. Sheriff not entitled to fees, 683. SHERIFF, I.

III. Action for malicious prosecution. What is evidence of reasonable and probable cause; how that question is to be left to the jury, 511. EVIDENCE, V. 4.

IV. What is the meaning of there being "*no* evidence" to go to the jury, 953, 973. SHIP, II. 3.

JUSTICES.

I. Jurisdiction of, generally; see JURISDICTION, III. IV.

II. Orders of.

1. Order of two justices for Middlesex, purporting to be signed and sealed in "the Police-office, Hatton Garden;" held to show sufficient jurisdiction on the face of it, 715. JURISDICTION, IV. 1.
2. Order of justices dismissing a surveyor appointed under the Building Act for wilfully demanding a fee to which he was not entitled; when bad for want of jurisdiction, 137. BUILDING ACT.
3. Order of justices on a union for payment of the expenses of conveyance to county asylum, and maintenance there, of a pauper lunatic; when good, under stat. 16 & 17 Vict. c. 97, s. 99; how far the copy of such order and of the powers of settlement are amendable under sect. 112, 919. POOR, I. 2.
4. Order of affiliation. What is a proper service of the summons, 822. BASTARDY.

KNOWLEDGE.

I. Of shipowner, that vessel was sent out by him in an unseaworthy state; when a defence to an action by him for loss by perils of the sea, 172. INSURANCE, I. 1.

II. Even though such misconduct of the plaintiff caused such loss only indirectly, 937. INSURANCE, I. 2.

III. Absence of knowledge, on the part of shipowner, as to vessel being sent out in an unseaworthy state; does not entitle him to recover against insurer the expenses of repairs made necessary by such unseaworthiness, 192. INSURANCE, I. 3.

IV. Implied undertaking by shipper of goods on board a general ship, not to ship dangerous goods without the knowledge of shipowners, 470. SHIP, II. 1.

LANDLORD AND TENANT.

I. Agreement by defendant to grant to plaintiffs a lease of certain land "for a term of five years;" defendant to repay to plaintiffs at the end of the term, their expenses incurred in making roads and buildings on the land. The granting the lease not a condition precedent to such repayment; meaning of "term," 255. CONDITION PRECEDENT, I.

II. Action claiming a writ of mandamus (under Common Law Procedure Act, 1854) to compel performance of an agreement to grant a lease. Mandamus not applicable, 273. COMMON LAW PROCEDURE ACTS, I. 2.

III. Lease by deed. When evidence admissible to show that it was delivered as an escrow, the interest in the term to vest upon the occurrence of a particular event, 986. DEED, III. 2.

IV. Deed of demise, delivered as an escrow. Liability of tenant for use and occupation, 982. DEED, III. 2.

V. Lease of mines. Action by lessor against lessee for non-payment of tonnage rent. Plea, an annual accounting by lessee, and acceptance by lessor of the sum then agreed to be due. When such a plea is answerable by a replication alleging error in such account, 691. ACCOUNT.

VI. Agreement, between landlord and tenant, that tenant should purchase certain goods at the end of his term. Acceptance by him, held not within the Statute of Frauds, and invalid as against the vendor, where the bargain had been previously disaffirmed by the latter, 765. STATUTE OF FRAUDS.

VII. Covenant by lessee not to carry on any public business on the premises. What amounts to a breach.

A lease of a house contained a covenant that the lessee, or his assigns, "shall not, nor will, at any time during the said term," "convert the said demised premises, or any part thereof, into a shop or public-house, or use, exercise, follow, or carry on," "within or upon the said messuage," &c., "any public trade or business whatsoever, without the consent in writing of" the lessor; "and also that the said messuage and dwelling-house and premises, during the said term hereby granted, shall be occupied, and used as a private dwelling-house only."

The lessee used the house as a day school, for girls under thirteen, for music and dancing: and a brass plate with the words "Ladies' School" was placed on the outer gate. A placard was also circulated, announcing that the lessee's Academy was open, at the premises, for the practice of dancing, for two evenings in the week; that private instruction would, if required, be given there; and that a select class for singing was open on one evening in the week. No meetings took place in consequence of this placard; and the instruction was confined to the day-scholars.

Held to be a breach of the covenant. *Wickenden* v. *Webster*, 387

LETTERS PATENT.

Action for a sum payable under a license to manufacture under plaintiff's patent. Plea, that letters patent were void, held bad, the patent having been used by defendants, 936. CONTRACT, VII. 2.

LIFE ESTATE.

See DEVISE, II.

LIGHTING ACT.

See RATE, IV.

LIMITATIONS, STATUTE OF.

STATUTE OF LIMITATIONS.

LOAN.

I. Bond by a public company, to secure a loan from, and their banking account with, a banker. Under what circumstances a resolution of the directors, authorizing such loan, may be presumed: whether it need specify the amount, 327. COMPANY, I. 2.

II. Bond by churchwardens, to secure a loan under Church Building Act. What is a borrowing within the statute, 807. RATE, II. 2.

LOCAL BOARD OF HEALTH.

See PUBLIC HEALTH ACT.

LUNATIC.

Expenses of conveyance of pauper lunatic to county asylum, and of his maintenance there, by whom payable, under stat. 16 & 17 Vict. c. 97, 919. POOR, I. 2.

MAINTENANCE, ORDER OF.

I. Of illegitimate child. What is a sufficient service of a summons in bastardy to give the justices in petty sessions jurisdiction to make an order of affiliation and maintenance, 822. BASTARDY.

II. Of pauper lunatics in county asylum. By whom the expenses are payable, under stat. 16 & 17 Vict. c. 97, s. 99, 919. POOR, I. 2.

MALICIOUS PROSECUTION.

Action for. What is evidence of reasonable and probable cause; how that question is to be left to the jury, 511. EVIDENCE, V. 4.

MANDAMUS.

I. Claim of, by plaintiff, under Common Law Procedure Act, 1854. To what kind of obligations it is applicable, 273. COMMON LAW PROCEDURE ACTS, I. 2.

II. A mandamus cannot issue to compel a local board of health to pay a reasonable remuneration to the person conducting the first election of the board, 287. PUBLIC HEALTH ACT, II. 1.

MARINE INSURANCE.

See INSURANCE.

MARRIAGE SETTLEMENT.

See HUSBAND AND WIFE.

MASTER (OF SHIP).

I. Who is entitled to freight, the bills of lading being signed by the master as agent for the charterers, 232. BILL OF LADING, I.

II. Under what circumstances the master is justified, in the absence of orders, in not sending for orders to the charterers, and in taking the ship to a port named in the charter-party, 670. SHIP, VI.

See, generally, SHIP.

MASTER AND SERVANT.

I. What is an "artificer," within the meaning of the Truck Act, 584. TRUCK ACT.

II. Liability of the proprietor of a hackney carriage for loss of goods through the negligence of the driver, 207. AGENT, I. 2.

III. Bond by millowners, agreeing to carry on business and remunerate their workmen according to the resolution of a majority, held illegal, 47. CONTRACT, VII. 1.

MAXIMS.

I. Consensus tollit errorem, 340. COMMON LAW PROCEDURE ACTS, II.

II. Dolus circuitu non purgatur, 948. INSURANCE, I. 2.

III. In jure non remota causa, sed proxima, spectatur, 947. INSURANCE, I. 2.

IV. Injuria non excusat injuriam, 76. CONTRACT, VII. 1.

V. Ut res magis valeat quam pereat, 336. BILLS OF EXCHANGE AND PROMISSORY NOTES, I.

VI. Volenti non fit injuria, 224. APPEAL, I. 2.

MEASUREMENT.

I. When the statement, in the charter-party, of the ship's tonnage, is matter of description only, and not a warranty, 675. SHIP, II. 2.

II. Measurement of distances under Turnpike Acts, 350. TURNPIKE, I.

MEMORANDA.

Hilary Vacation, 206.

Trinity Term, 794.

Michaelmas Term, 901.

MEMORANDUM.

I. Of an agreement; when oral evidence admissible to show that it was intended that it should not operate as an agreement until approved of by a third party, 370. CONTRACT, IX. 1.

II. In a marine policy. Under what circumstances the ordinary memorandum as to average exempts the underwriters from liability for total loss, 422. INSURANCE, III. 1.

III. Within the Statute of Frauds, sect. 4. What is a sufficient ratification by the principal of the agent's agreement, to constitute a signed memorandum within the statute, 868. STATUTE OF FRAUDS, I.

MERCHANT SHIPPING ACT, 1854.

(17 & 18 VICT. c. 104.)

Action for running down plaintiff's ship. How the question whether she was "close hauled" is to be left to the jury.

A sailing vessel sailing on the starboard tack very near the wind, met a steamer. The vessel did not put her helm to port, and a collision ensued. In an action by the owners of the vessel against the owners of the steamer, evidence was given of negligence on the part of the crew of the steamer; it was contended that the plaintiffs could not recover, as, by The Merchant Shipping Act, 1854, sect. 296, their vessel should have put her helm to port. The judge left it to the jury to say whether the vessel was close hauled on the starboard tack, and whether she would have lost command by putting her helm to port; intimating his own opinion as to the facts to be that a vessel may be close hauled, though not quite so near the wind as she could lie; and that a vessel going about was not under command. The verdict was for the plaintiff.

Held, on a rule for a new trial on the ground of misdirection, that the direction was unexceptionable. *Chadwick* v. *City of Dublin Steam Packet Company*, 771

METROPOLIS LOCAL MANAGEMENT ACT.

(18 & 19 VICT. c. 120.)

I. Action for maliciously rejecting plaintiff's vote at an election of vestrymen and auditors. Plea, that a rate was then unpaid by plaintiff; replication that rate was void, &c., 289. RATE, II. 1.

II. What is an occupation of "houses, buildings, and property, other than land," within sect. 165; and what an occupancy of land, 1008. RATE, IV.

METROPOLITAN BUILDING ACT.

BUILDING ACT.

METROPOLITAN HACKNEY CARRIAGE ACTS.

(1 & 2 W. 4, c. 22, and 6 & 7 VICT. c. 86.)

Liability of registered proprietor for loss of goods through negligence of driver, 207. AGENT, I. 2.

METROPOLITAN POLICE ACT.

(10 GEO. 4, c. 44.)

Order of justices, purporting to be signed and sealed at "the Police Office, Hatton Garden." Court will take judicial notice, looking at sect. 4, that Hatton Garden is in Middlesex, 715. JURISDICTION, IV. 1.

MIDDLESEX.

Right of practising attorney to lay venue in, 982. TRIAL, I.

MINE.

I. Qualified right of owner of surface to support as against owner of mine.

Action for injuring the plaintiff's reversion, by removing the minerals without leaving support to the surface, on which were houses more than twenty years old; whereby the houses were injured. On a special case it appeared that, ninety years before the action, the locus in quo was enclosed by an award made under an enclosure Act: that the surface was allotted to P., whose estate plaintiff had; and the minerals to H., whose estate defendant had: that on the face of the award it was stipulated that the allottees of the mines should have liberty to work the mines, and the allottees of the surface should have no claim to compensation for any consequent sinking of the surface. P. executed the award as a deed. H. did not execute it, but accepted the allotment under it. The houses were afterwards built. By defendant's mining, without negligence, the surface unavoidably sunk.

Held, that it sufficiently appeared that, upon the severance of the minerals and surface, the owner of the surface took it as a separate tenement with only a qualified right of support: that no further right of support was gained by the erection of the houses, though they had stood for more than twenty years; and that the subsequent owners of the surface took it with only the qualified right of support originally created: and that therefore the plaintiff was not entitled to maintain the action. *Rowbotham* v. *Wilson*, 593

II. Enclosure Act, giving power to Lord of Manor to work mines, &c. Right of owner of surface to support, as against the lord.

An enclosure Act gave power to allot commons and waste lands in the manor of W. It recited that J. was lord of the manor, and entitled to the soil of the commons and waste lands, and enacted that it should be lawful for J., and the lord of the manor for the time being, and his agents, &c., to come upon the commons and waste lands, to search for and get coal, erect works, and make bricks, making compensation to any person whose allotment should be damaged.

Agreed: that this conferred no power on the lord so to work the mines as to destroy the support of the surface.

It was also enacted that the lord should not open any work on the surface within forty yards of any dwelling-house, now or hereafter to be erected, nor get any coal or ironstone under such dwelling-house within the perpendicular distance of forty yards from the foundation; and that persons entitled to such dwelling-houses might enter the mines to discover the perpendicular distance of the dwelling-houses from the mines, and if the mines were within the perpendicular distance of forty yards from the buildings, so as to endanger them, might repair and secure the buildings at the expense of the lord.

The lord having worked the mines at a greater perpendicular distance than forty yards from a dwelling-house, and thereby injured it,

Held: that he was liable to an action, the Act not interfering with the common law right of the owner of the surface to the support of the subjacent strata. *Roberts* v. *Haines*, 643

III. Action by lessor of mines against lessee, for non-payment of tonnage rent. Plea, an annual accounting by defendant, and acceptance by plaintiff of the sum then agreed to be due. When such a plea is answerable by a replication alleging error in such account, 691. ACCOUNT.

MINERALS.

See MINE.

MISDESCRIPTION.

I. Of a ship's tonnage, in a charter-party; held not to amount to a warranty, 675. SHIP, II. 2.

II. In a voting paper, at an election of councillors under the Municipal Reform Act. When curable under sect. 142: what is a sufficient description, 363. MUNICIPAL CORPORATION REFORM ACT, I.

MONEY HAD AND RECEIVED.

Action for, by husband against trustee of wife: equitable defence, 497. HUSBAND AND WIFE.

MORTGAGE.

Of shares in a Joint Stock Company, not drawn up according to the statutable form of conveyance. Company not bound to register, 415. COMPANY, II. 2.

MUNICIPAL CORPORATION REFORM ACT.

(5 & 6 W. 4, c. 76.)

I. Election of councillors: what is a sufficient description of property in a voting paper; what misdescription is curable under sect. 142.

At an election for councillors for M., voting papers were tendered signed, A. B., "voting for property situate in the parish of C.;" they were rejected, and the rejection altered the majority. In an information in the nature of Quo warranto against the councillors returned, it was admitted on the record that the borough of M. consists of parts of two parishes, the parish of C. being one: that though there are in M. streets and lanes, the description in the voting papers was such as to be commonly understood; and that the boundaries of the parish are well known and defined.

Held that the fault, if it was one, was cured as a misdescription under stat. 5 & 6 W. 4, c. 76, s. 142.

Per Coleridge, J. The voting paper was not a sufficient description within sect. 32. Per Lord Campbell, C. J., and Crompton, J., *semble* it was. *Regina* v. *Spratley*, 363

II. Inspector of weights and measures for a district: under what circumstances, since the passing of the Act, the appointment is in the Quarter Sessions, 830. JURISDICTION, III. 3.

MUTUAL DEBTS.

I. What can be set off as such, by an executor, in an action against him, as such, for a debt due to plaintiff from testator in his lifetime, 976. SET-OFF, II.

II. Effect of a release of debts by creditors, he owing a lesser sum to the debtor. What is the "debt" released by the creditor, 795. DEED, III. 1.

NEGLIGENCE.

I. When the non-performance of a particular act would amount to a criminal neglect of duty, the law presumes its performance, and the onus of proof is on the party alleging the negative, 470, 484. SHIP, II. 1.

II. Negligence of guest, when sufficient to disentitle him from recovering in an action against the landlord for the loss of goods, 891. BAILMENT, II. 1.

III. Negligence of driver of a hackney carriage. The registered proprietor liable, 207. AGENT, I. 2.

NON EST FACTUM.

Replication of; held to be supported by evidence that, after the execution of the deed by plaintiff, a blank left in it for insertion of the amount thereby to be released by him, was erroneously filled up, without his authority, 795. DEED, III. 1.

NOTICE.

I. Generally.

Implied undertaking by shippers of goods on board a general ship, not to ship dangerous goods, which the shipowners or their servants cannot reasonably be expected to know to be dangerous, without notice. What amounts to an allegation of such notice, in plea to an action for so shipping, 470. SHIP, II. 1.

II. Of appeal.

Sessions, bound to enter and respite an appeal against a poor-rate, for want of notice to all the proper parties, 992. APPEAL, II.

III. Of trial.

How far a defendant may avail himself of a verbal inaccuracy in the notice of trial, 656. TRIAL, II.

NUISANCES REMOVAL ACT.

(England, 18 & 19 VICT. c. 191).

Resolution authorizing a composition for an annual assessment under the Act, how far illegal; what is a valid rate, 395. RATE, V.

ORDERS OF JUSTICES.

See JUSTICES.

OUTLAWRY.

On what terms the Court of Queeen's Bench will set aside the outlawry of an insolvent finally discharged by the Insolvency Court, 376. BANKRUPT AND INSOLVENT, II.

OUTSTANDING TERM.

Devise to trustees, to the use of testator's daughter for life, after her death to the use of the heirs of her body, remainders over: trustees to pay legacies and debts, and to reimburse themselves for any loss thereby out of the estate. Effect, as barring the heir-at-law of the daughter, of an outstanding term, created by trustees, 606. DEVISE, I.

PARLIAMENTARY ELECTION.

When a promise by candidate to pay, or a payment by him of, the travelling expenses of a voter is, and when it is not, illegal, 447. CORRUPT PRACTICES PREVENTION ACT.

PARISH.

Misdescription in voting paper, of the parish in which the property of the voter is situate, at an election of councillors under Municipal Corporation Reform Act; when curable under sect. 142; what is a sufficient description, 363. MUNICIPAL CORPORATION REFORM ACT, I.

PATENT.

See LETTERS PATENT.

PAYEE.

I. When payee uncertain, instrument not a promissory note, 333. BILLS OF EXCHANGE AND PROMISSORY NOTES, I.

II. Right of property in an unaccepted draft, drawn by consignees of cargo on consignors, afterwards bankrupt, to protect advances made to the latter by a third party before their bankruptcy, 742. BILLS OF EXCHANGE AND PROMISSORY NOTES, II.

PENALTY.

Sum of money agreed to be paid as liquidated damages, and not as a penalty, in case of breach of covenant: when recoverable as liquidated damages, 528. DAMAGES, II.

PERFORMANCE.

Mandamus to compel specific performance under Common Law Procedure Act, 1854. To what kind of obligations it is applicable, 273. COMMON LAW PROCEDURE ACTS, I. 2.

PETTY SESSIONS.

I. Jurisdiction of; see JURISDICTION, IV.

II. Orders of Justices at; see JUSTICES, II.

PLEA.

See PLEADING, II.

PLEADING.

I. Declaration.

1. Venue. Privilege of practising attorney to lay venue in Middlesex, 982. TRIAL, I.
2. Claim of mandamus for specific performance, under Common Law Proceduro Act, 1854. To what obligations it is applicable, 273. COMMON LAW PROCEDURE ACTS, I. 2.

II. Plea.

1. Equitable pleas, under Common Law Procedure Act, 1854; 497. HUSBAND AND WIFE.
2. Action by endorsee of bill of exchange against endorser. Defendant having admitted his endorsement to plaintiff, estopped from traversing previous endorsement to himself, 266. BILLS OF EXCHANGE AND PROMISSORY NOTES, III.
3. Declaration by a joint stock Company, in the statutable form, for calls. Plea, that defendant was induced to become shareholder by fraud of plaintiffs, held bad, for not showing renunciation on his part, 761. COMPANY, II. 3.
4. Action for a sum of money agreed to be paid by defendant for the use of plaintiff's patent. Plea, that letters patent were void, held bad, the patent having been actually used by defendant, 930. CONTRACT, VII. 2.

III. Replication.

1. Action by lessor of mine against lessee, for non-payment of tonnage-rent. Plea, an annual accounting by defendant, and acceptance by plaintiff of sum then found due. Replication, alleging error in such account, when good, 691. ACCOUNT.
2. Replication of non est factum, held to be supported by proof that, after the execution of the deed by plaintiff, a blank left in it for the insertion of the sum thereby to be released by him, was erroneously filled up, without his authority, 795. DEED, III. 1.
3. Election of vestrymen, under stat. 18 & 19 Vict. c. 120. Action for maliciously rejecting plaintiff's vote. Plea, that a rate was then unpaid by plaintiff. Replication that rate was void, held good, 289. RATE, II. 1.

IV. Right to begin.

Where defendant demurs to the declaration and also pleads over, and plaintiff demurs to the plea, plaintiff has the right to begin, 312. INSURANCE, II.

POLICE ACT.

METROPOLITAN POLICE ACT.

POLICY.

See INSURANCE.

POOR.

I. Adjudication of settlement.

1. By justices of Middlesex, purporting to be signed and sealed at "the Police Office, Hatton Garden." Held to show sufficien

jurisdiction on the face of it, 715. JURISDICTION, IV. 1.

2. Of a lunatic pauper, under stat. 16 & 17 Vict. c. 97. When the expenses of maintenance at asylum are payable by the Union. Power of Sessions to amend copy of order and particulars of settlement.

Justices sent a pauper lunatic, residing in the township of M. in the county of L., to the county lunatic asylum of L., where he remained a patient for about three months, when he was discharged. About nine months after, justices made an order adjudicating the settlement of the pauper to be in S., in the union of H., in the county of Y., and ordering the union to pay the expenses of the conveyance to the asylum, and of the lodging, &c., there, under stat. 16 & 17 Vict. c. 97, s. 99.

On appeal against the order for payment, it was objected that such order was bad, inasmuch as by sect. 102 such expenses, in the case of a pauper lunatic who would at the time of the conveyance to the asylum have been exempt from removal to the parish of his settlement by reason of stat. 9 & 10 Vict. c. 66, are to be paid by the parish where the exemption has been acquired, and not by the parish of settlement; and that, under stat. 9 & 10 Vict. c. 66, s. 4, no warrant could be granted for removal of any person becoming chargeable in respect of relief made necessary by sickness, unless it was stated in the warrant that the justices granting it were satisfied that the sickness would produce permanent disability; and that it appeared in this case that the lunacy was not such a sickness.

Held, that sect. 4 of stat. 9 & 10 Vict. c. 66 was inapplicable, and the order for payment good.

Under sect. 107 of stat. 16 & 17 Vict. c. 97, three guardians of M. sent to the union of H. a copy of the order for payment, with the place of confinement, the grounds of adjudication, and the particulars of settlement relied upon. They signed their names to this, adding "guardians of the poor of the said township of M.:" but to one of the three names no other address was added.

Held: that the statement, if not good under sect. 107, was amendable under sect. 112. *Regina* v. *Guardians of Manchester*, 919

II. Poor-Rate. See RATE, I.

III. Appeal.

1. Sessions bound to enter and respite, for want of proper notice to all the parties, under stat. 41 G. 3, c. 23, 992. APPEAL, II.

See, generally, RATE, I.

IV. Poor Law auditor. Finality of his decision as to disallowing items of an attorney's bill, 408. CERTIORARI, III.

POSSESSION.

What kind of taking, so as to change the possession, is necessary to support an action of replevin, 842. REPLEVIN, I.

POSTEA.

When it need not show, on trial by a Judge without a jury (under Common Law Procedure Act, 1854), the consent in writing of the parties, 338. COMMON LAW PROCEDURE ACTS, II.

POWER.

To trustees, by devise, to pay debts, &c., and reimburse themselves out of the estate for any loss on the trust account. What is a good execution of such power, 606. DEVISE, I.

PREFERENCE.

Fraudulent. See ASSIGNMENT, III.

PRESUMPTION.

I. When the non-performance of a particular act would amount to a criminal neglect of duty, the law presumes its performance, and the onus of proof is on the party alleging the negative, 470, 484. SHIP, II. 1.

II. Bond by directors of a joint stock Company, to secure a loan from, and their banking account with, the obligee. Presumption of a resolution of the directors, authorizing such security, 327. COMPANY, I. 2.

PRINCIPAL AND AGENT.

AGENT.

PRINCIPAL AND SURETY.

SURETY.

PRISON.

GAOL.

PROBABLE CAUSE.

What is evidence of, in an action for malicious prosecution. How such evidence is to be left to the jury, 511. EVIDENCE, V. 4.

PROMISSORY NOTE.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROSECUTION.

Malicious.

Action for. What is evidence of reasonable and probable cause. How that question is to be left to the jury, 511. EVIDENCE, V. 4.

PROVISIONAL ORDER.

Of Board of Health. See PUBLIC HEALTH ACT.

PUBLIC HEALTH ACT, 1848.

(11 & 12 Vict. c. 63.)

I. General Board of Health.

Provisional order, incorporating Towns' Improvement Act, 1847, with Local Sanitary Act, how far invalid.

The General Board of Health made a provisional order extending the Public Health Act, 1848, to T., a district within which were parts of the S. turnpike roads, made under local turnpike Acts. A local sanitary Act also applied to the district. The provisional order altered the local sanitary Act, and directed, inter alia, that from and after the passing of any Act of Parliament confirming that order, sect. 50 of the Towns Improvement Clauses Act, 1847, should be incorporated with the local sanitary Act. The order was confirmed by statute "so far as" "authorized by The Public Health Act." The Towns Improvement Clauses Act, 1847, sect. 50, forbids trustees of any turnpike road from levying toll within the limits of the special Act. The surveyor of the Local Board of T., by their order, removed the S. turnpike gates within the district. The clerk of the S. turnpike trustees sued him in trespass for so doing.

On a case stating the above facts,

Held by Coleridge, Erle, and Crompton, Js., that the part of the order incorporating The Towns Improvement Clauses Act 1847, sect. 50, was not authorized by The Public Health Act 1848, and was void; and the plaintiff had judgment. Lord Campbell, C. J., dissentiente. *Clayton* v. *Fenwick*, 114

II. Powers of local board.

1. Discretion of local board as to amount of remuneration to person conducting the first election.

The Court will not order a Local Board of Health to pay a reasonable remuneration to the person conducting the first election of the Board, upon the suggestion that they have allowed only an inadequate sum: the Board having under the Public Health Act, 1848 (11 & 12 Vict. c. 63), a discretion as to what sum they think reasonable to allow, and the exercise of their discretion in this respect not being subject to review. *Ex parte Metcalfe*, 287

2. What is a proper election of new members.

A Local Board of Health constituted under an order in council consisted of nine members, one-third of the persons first elected to go out of office on 31st March, 1855. Before that day three of the persons first elected ceased to be members, by reason of non-attendance.

The Local Board selected those three to go out of office; and on 31st March three new members only were elected. Held (under sects. 13, 18 of The Public Health Act, 1848, 11 & 12 Vict. c. 63), that the Board, consisting of the six members first elected, and the three new members, was well constituted. *Howitt* v. *Manfull*, 736

3. Maintenance of highways in a district assigned to a local board, comprising parishes maintaining their own highways. What is the proper form of rate, 518. HIGHWAY, II.

PURCHASE.

See VENDOR AND VENDEE.

QUARTER SESSIONS.

Jurisdiction of. See JURISDICTION, III.

Rating by. See RATE.

RAILWAY COMPANY.

I. Assignment of shares in. What is a transfer, what a transmission, within Companies Clauses Consolidation Act, 277. COMPANY, II. 1.

II. Carriage of goods by: what are "small," and "separate," "parcels," and "manufactured goods," under special act. Effect of contract with agents to collect, 77. CARRIER, I.

RATE.

I. Poor-rate.

1. Waterworks Company. Under what circumstances land used for waterworks, vested for that purpose in a corporation, is rateable as property occupied for public purposes.

By a local Act, commissioners were empowered to erect waterworks for the purpose of supplying water for watering the streets, use in case of fires, and other public purposes in Liverpool, and to levy a rate on the borough for the expenses thereof. The Act contained express prohibitions against using this water for domestic purposes. The Commissioners erected waterworks in the adjoining township of West Derby. By subsequent Acts the property and powers of these commissioners became vested in the municipal corporation of Liverpool.

Water was supplied in Liverpool for domestic purposes by trading companies from waterworks also situated in the township of West Derby. The municipal corporation were, by a local Act, empowered to purchase the undertakings of these companies, and for that purpose to borrow money. When purchased, the corporation were to supply

water for domestic purposes to the inhabitants of Liverpool, which then comprised the parish of Liverpool and part of the township of West Derby, and of parts of other townships, with power to supply the inhabitants of an adjoining district, including the whole township of West Derby. It was enacted, that they were so to regulate the charges for the water so supplied as to raise no more money than the interest of the money borrowed and the expenses of managing the waterworks. The purchase was completed; and those waterworks were vested in the Corporation.

By a subsequent Act, the Corporation were empowered to use the water from the commissioners' waterworks and the company's waterworks indiscriminately; and the pipes were accordingly united; and the two sets of waterworks were occupied in common.

Held, that the Corporation were rateable in the township of West Derby for the waterworks there occupied by them under these enactments. *Mayor of Liverpool* v. *Overseers of West Derby*, 704

2. Land bought by one canal Company of another. In whom is the substantial occupation for the purposes of rating. Prospective effect of local Act as to lands acquired by the former Company.

By stat. 52 G. 3, c. cxcv. s. 1, The R. Canal Company was incorporated, and power was given to the Corporation to hold lands without restriction as to amount or locality, and to take lands and to form a canal in certain enumerated parishes, amongst which H. was not. By sect. 101 lands "of and belonging to the said Company" were to be rated like other lands of a like quality in the same parishes. Subsequently lands were purchased in the parish of H. in the name of a trustee, and occupied by the R. Canal Company as a reservoir.

Held: that sect. 101 of stat. 52 G. 3, c. cxcv., was prospective, and applied to all lands acquired by the R. Canal Company; and that the lands in H., the fee of which was in another party, but which were substantially occupied by the R. Canal Company, were to be rated as other lands of a like quality in the parish of H. *Regent's Canal Company* v. *Hendon*, 852

3. Appeal against a poor-rate. Sessions bound, under stat. 41 G. 3, c. 23, to respite and enter, for want of notice to all the proper parties, 992. APPEAL, II.

II. Church-rate.

1. Action for maliciously rejecting plaintiff's vote at an election of vestrymen, under stat. 18 & 19 Vict. c. 120. Plea: that a rate was then due from and unpaid by plaintiff. Replication that rate was void, &c.

Count for maliciously rejecting the plaintiff's vote at an election of vestrymen and auditors under stat. 18 & 19 Vict. c. 120. Plea: That the plaintiff was rated to a church-rate more than six months before the election, and at the time of the election the rate was due and unpaid. Replication: that the rate was void in this, that it was made for defraying expenses for which a rate could not be made. Rejoinder: That the rate was good on the face of it, and had never been quashed. Demurrer. Held, that, the plaintiff having no means of questioning the rate, the rejoinder was not good. But that the replication was good, as it showed that the rate was not due, and therefore that the plaintiff was entitled to vote; and that the action lay, malice being admitted on these pleadings. *Tozer* v. *Child*, 289

2. Charge by churchwardens upon the rates of the parish, under stat. 58 G. 3, c. 59, to secure repayment of expenses incurred in church repairs. What is a "borrowing" within the statute. Liability of future ratepayers.

Stat. 58 G. 3, c. 45, s. 59, authorizes the churchwardens of any parish, with the consent of the vestry and of the bishop and incumbent, "to borrow and raise, upon the credit of the rates of any such parish, such sum or sums of money as shall be necessary for defraying the expense or any part of the expense of enlarging or otherwise extending the accommodation in the then existing churches or chapels of such parish; and to make rates for the payment of the interest of such sum or sums of money so to be borrowed and raised, and for providing a fund of not less than the amount of the interest upon the sum advanced for the repayment of the principal thereof, or for repaying such principal in such manner and at such times and in such proportions as shall be agreed upon with the persons advancing any such money."

On 22d June, 1826, the vestry of a parish passed a resolution to enlarge the parish church, to approve the estimate of the contractors for the sum of 2390*l.*, and to borrow the money necessary for the plan, beyond the sum already raised, upon bonds of 50*l.* each, bearing 5 per cent. interest. On 7th December, 1826, the vestry passed another resolution, authorizing the churchwardens, with the assistance of a committee, "to borrow at interest any sum or sums of money not exceeding 2000*l.*" for the payment of such expenses. The resolution further declared that, "in order to secure the repayment of such money so borrowed," the churchwardens for the time being should, from time to time, make such rates as should be necessary for payment of interest on such debt, and not less than 5 per

cent. to accumulate as a sinking fund. The consent of the bishop of the diocese and of the incumbent was given to this resolution. The work was done by the contractors between 29th June, 1826, and 29th March, 1830. A sum of 400*l.* then remained due to the contractors; and the then churchwardens agreed that this sum should be treated as a loan from the contractors to the parish; and they executed four deeds of charge upon the rates of the parish, for the sum of 50*l.* each, at 5 per cent. interest, payable on 31st March, 1831, and expressed to be in part liquidation of the debt. Interest was regularly paid on the bonds until after March, 1850; but no demand was ever made by or on behalf of the obligees that any fund should be provided for the payment of the principal; nor had any such fund been provided.

On mandamus to the churchwardens for the time being to make rates for the purpose of paying to the executors of the obligees the principal and the arrears of interest upon the bonds,

Held: 1. That the consent of the committee to the borrowing, or quasi borrowing, of the 400*l.*, if essential to the validity of the bonds, might be presumed, although it did not appear upon the face of the instruments.

2. That the transaction amounted to a "borrowing" within sect. 59; and that the bonds were to be considered as given to secure, not a past debt, but a present loan.

3. That the liability of the rate-payers under the bonds was not destroyed by the obligee having failed, during 20 years, to demand that they should provide a fund for payment of the principal. *Regina* v. *St. Michael's, Southampton,* 807

III. Highway-Rate.

1. Maintenance of highways, under Public Health Act. What form of rate is to be imposed on a statutory district, comprising parishes separately maintaining their own highways, 518. HIGHWAY, II.

2. Election of surveyors of highways under General Highway Act (5 & 6 W. 4. c. 50.) Persons *rateable* in respect of highway rate, entitled to vote, 999. HIGHWAY, I.

IV. Lighting-Rate.

Under Metropolis Local management Act. What is an occupancy of "houses, buildings, and property, other than land" within sect. 165: and what an occupancy of land.

A water company were occupants of pipes under the surface of the soil in a parish in which the provisions of The General Lighting Act (3 & 4 W. 4, c. 90) had been adopted. The parish was within the Metropolitan district. In a lighting rate imposed under The Metropolitan Local Management Act, the Company were rated as coming within the description in sect. 165 of occupants of "houses, buildings, and property, other than land," at a rate three times greater than that at which the occupiers of land were rated.

Held, that they were rateable at the lower rate, as occupiers of land. *Regina* v. *Southwark and Vauxhall Water Company,* 1003

V. Sewers-Rate.

Resolution authorizing a composition for an annual sewers rate under Nuisances Removal Act, how far illegal. What is a valid rate.

The local authority, under The Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), for the purpose of rendering inocuous a ditch, by which the filth was conveyed from certain houses, and which constituted a nuisance, constructed a sewer, and, for the purpose of defraying the expense, under sect. 22, assessed the houses then using the ditch or the sewer at an annual sum, amounting to 6*d.* in the pound on the assessment to the highway rate. By a separate resolution, passed afterwards on the same day, it was resolved that the annual payment might be compounded for, within two months after service of notice of assessment, by payment of the amount of four years' annual payments; after one year from the date of the assessment, by payment of the amount of three and a half years' annual payments; after two years, by paymont of the amount of three years' annual payments; after three or more years, by payment of the amount of two years' annual payments; all arrears in every case having been first paid up: in default of such composition, the payment to be perpetual.

Notice of the assessment, containing also on the same paper, a notice of the subsequent resolution, was served upon the owners and occupiers. Payment peing refused by an occupier, justices were applied to for a warrant of distress, which they refused to grant. On motion to this Court for an order upon them to do so, Held:

That supposing the resolution respecting the composition to be illegal (and *semble* that it was not), it was a matter distinct from the rate, which therefore was not invalidated by it.

That the rate was not bad for being confined to houses then using the ditch or sewer.

And although it was not published or allowed as required in the case of a highway-rate by stat. 5 & 6 W. 4, c. 50, s. 27.

Order made. *Regina* v. *Warner,* 395

RATIFICATION.

I. By directors of a joint stock Company, of a contract not made according to the regulations of the deed of settlement, 341. COMPANY, I. 1.

II. By principal, of unauthorized contract by agent, 868. STATUTE OF FRAUDS, I.

REASONABLE AND PROBABLE CAUSE.

What is evidence of, in an action for malicious prosecution. How the evidence is to be left to the jury, 511. EVIDENCE, V. 4.

RECORD.

When it need not state the consent in writing of the parties to the cause being tried by a Judge without a jury under the Common Law Procedure Act, 1854, 338. COMMON LAW PROCEDURE ACTS, II.

RECORDER.

When he has not the appointment of inspector of weights and measures for a district, under sect. 105 of Municipal Corporation Act, 830. JURISDICTION, III. 3.

REFERENCE.

To arbitration. See ARBITRATION.

REGISTRATION.

I. Of shares. COMPANY, II. 1, 2.

II. Of a conveyance of personal chattels, under stat. 17 & 18 Vict. c. 36, 876. BANKRUPT AND INSOLVENT, II. 4.

REGULA GENERALIS.

(Hilary Term, 1853), 656, 658. TRIAL, II.

REJOINDER.

See PLEADING, III.

RELEASE.

By deed, pleaded in an action by creditor against debtor. Replication, that, after execution of deed, a blank left for the insertion of the sum to be released by plaintiff, was erroneously filled up without his authority, 795. DEED, III. 1.

REMITTER.

To arbitrator. ARBITRATION, II. 2.

RENUNCIATION.

I. By a shareholder, of all benefit from shares, must be alleged in a plea of fraud to an action for calls, 761. COMPANY, II. 3.

II. Of a purchaser of an estate at public auction, not permissible on any ground of objection specifically excluded by the conditions of sale, 659. CONTRACT, VII. 5.

III. By agent of one of two contracting parties, when it does not constitute a dispensation by such party, 953. SHIP, II. 3.

IV. Acceptance of bargain by vendee, after it has been renounced by vendor, not an acceptance within sect. 17 of Statute of Frauds, 765. STATUTE OF FRAUDS, II. 2.

REPAIRS.

Of ship, by whom payable.

I. When the ship is sent out in an unseaworthy state, and the damage is caused by ordinary risk, 192. INSURANCE, I. 3.

II. When the expenses are incurred in getting the ship off shore, and towing her to port for repair, after cargo in safety, 779. INSURANCE, IV.

REPLEVIN.

I. What description of taking, so as to change the possession, is necessary to support an action of replevin.

F., being in possession of plaintiff's goods, not as his servant, but as bailee with a special property, delivered them to defendant with intent to give him a lien against plaintiff; and defendant peaceably and bonâ fide took possession with this intention, but had no lien and had no right to detain the goods as against plaintiff. Plaintiff demanded the goods, and, being refused, brought replevin. Plea: Non cepit. On proof of the above facts plaintiff had a verdict, with leave to defendant to move to enter a verdict. A rule being obtained,

Held: that there had been no taking changing the possession: and that, though the plaintiff could have recovered in trover or detinue, replevin did not lie. And a rule was made absolute for a nonsuit. *Mennie* v. *Blake*, 842

II. Replevin bond, under stat. 9 & 10 Vict. c. 95. What is prosecuting the suit "with effect."

Where a party to a suit in replevin in a county court, whether plaintiff or defendant, removes the case, and gives, under sect. 121 of stat. 9 & 10 Vict. c. 95, a bond conditioned for prosecuting the suit with effect, the bond is forfeited if the obligor does not succeed in the suit. *Tummons* v. *Ogle*, 571

REPLICATION.

See PLEADING, III.

RESTRAINT OF TRADE.

Combination of millowners, when void for, 47. CONTRACT, VII. 1.

RETURNING OFFICER.

Action against, for malicious rejection of vote,

at an election of vestrymen. Plea that a rate was then unpaid by plaintiff: replication that rate was void, &c., 289. RATE, II. 1.

REVOCATION.

RENUNCIATION.

RIGHT TO BEGIN.

See PLEADING, IV.

ROAD.

See HIGHWAY.

RULE NISI.

Appeal to Exchequer Chamber, under Common Law Procedure Act, 1854, against the decision of Court below as to granting, discharging, or making absolute a rule. By whom costs of appeal and proceedings below are payable, when decision confirmed, 681. COMMON LAW PROCEDURE ACTS, III. See also SHIP, II. 2.

RUNNING DAYS.

See SHIP.

SAILING.

Agreement to pay a sum of money on a ship "being load and sailed." What is a sailing. When the sailing is a condition precedent to the payment, 565. SHIP, V.

SALE.

See VENDOR AND VENDEE.

SALE (BILL OF).

BILL OF SALE.

SCHEDULE.

To release, by deed, of debts. Effect of erroneous filling up, after execution of deed by creditor, and without his authority a blank in schedule left for insertion of the amount of his claim, 795. DEED, III. 1.

SCHOOL.

For dancing and music; when the use of a house for that purpose is an infringement of a covenant not to carry on any public business on the premises, 387. LANDLORD AND TENANT, VII.

SEAWORTHINESS.

See INSURANCE, I.

SERVANT.

MASTER AND SERVANT.

SESSIONS.

QUARTER SESSIONS.

SET-OFF.

I. Effect of a release of debt by creditor, he owing a lesser sum to the debtor; what is the "debt" released by the creditor, 795. DEED, III. 1.

II. What debts can be set off by an executor, sued as such, in an action against him for a debt due to plaintiff from testator in his lifetime.

An executor sued, as such, for a debt which accrued to the plaintiff from the testator in his lifetime cannot set off a debt (alleged to be equal to the damages sued for) for money had and received to the defendant's use, as executor, and money due on an account stated with him, as executor, since the death of the testator; the debt sued for and the debt sought to be set off not being mutual within stat. 2 G. 2, c. 22, s. 13.

By the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench. *Mardall* v. *Thellusson*, 976

SETTLEMENT.

Adjudication of.

1. Order of by justices for Middlesex within the Metropolitan Police district; what amount of jurisdiction must appear on the face of the order, 715. JURISDICTION, IV. 1.
2. Of a lunatic pauper. Expense of maintenance; amendment of the copy of order and particulars of settlement, 919. POOR, I. 2.

SETTLEMENT (MARRIAGE).

See HUSBAND AND WIFE.

SEWERS RATE.

See RATE, V.

SHARES.

See COMPANY, II.

SHAREHOLDER.

See COMPANY, II. III.

SHERIFF.

I. Not entitled to fees from party giving notice, under Common Law Procedure Act, 1852, that a cause is to be tried by special jury.

Under stat. 13 & 14 Vict. c. 61, s. 12, the certificate of the Judge who tries an action brought in a superior Court, that it appeared to him at the trial that there was a sufficient reason for bringing the action into that Court, may be given and endorsed on the record at any time after the assizes and before taxation of costs.

The sheriff is not entitled to fees from the party giving notice under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), sect. 112, that a cause is to be tried by special jury; although the alteration of the system as to special juries has deprived the sheriff of the fees by which he formerly was remunerated by the party for summoning the special jurors. *Bennett* v. *Thompson*, 683

II. Liability of sheriff's officer for taking more than the proper mileage fee for executing a fi. fa.

Under stat. 7 W. 4 & 1 Vict. c. 55, s. 3, a sheriff's officer is liable to an attachment if he take more than 6*d.* per mile for mileage on executing a fi. fa. where the distance exceeds five miles, the allowances sanctioned by the judges under sect. 2 being only 6*d.* per mile. Although in the particular county it appears that the custom has been to take 1*s.* per mile. *Gill* v. *Jose*, 718

III. Interpleader issue, decided partly for plaintiff, partly for defendant. How costs are to be taxed, 392. Costs, I. 1.

SHIP.

First. Building of.

I. Right of assignees of bankrupt shipbuilder to the unfixed materials, of the party for whom it was being constructed to the body, of an unfinished ship, 355. Bankrupt and Insolvent, III. 3.

Secondly. The loading.

II. Liability of shippers.

1. When shipping goods of a dangerous nature on board a general ship.

First count: That plaintiffs were owners of a general ship; that defendants caused a corrosive substance to be packed in casks, and delivered to plaintiffs, as casks of bleaching powder, to be carried in the ship: that plaintiffs and their agents were ignorant that bleaching powder contained a corrosive substance, and the casks outwardly appeared to be sufficient; but that the casks were insufficient, and the contents so improperly packed, that the corrosive contents escaped and destroyed the cargo. Second count: That defendants shipped a dangerous article, knowing it to be such, without notice of its danger; and the plaintiffs, without knowledge of its dangerous nature, received it, and stowed it in the hold, where it did mischief. Pleas. 3: to so much of the first count as relates to the insufficiency of the packages: that defendants purchased the goods ready packed from third persons, named, and were not themselves, or by their servants, guilty of negligence. Plea 4, to first count: that the persons employed on the ship knew and had the means of judging of the sufficiency of the casks. Plea 10: to the second count: that the master of the ship knew, or had the means of knowing, the dangerous nature of the goods. On demurrer to the pleas:

Held by Lord Campbell, C. J., and Wightman, J.: that there is an implied undertaking on the part of shippers of goods on board a general ship that they will not deliver to be carried on the voyage packages of a dangerous nature, which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature, without giving notice. That, consequently, both counts were good and the 3d plea bad. But that the 4th and 10th pleas, which they construed to amount to an allegation of facts equivalent to notice, were good.

Held, by Crompton, J.: that the implied undertaking of the shipper did not extend beyond an obligation to take proper care not to deliver dangerous goods without notice; and that on the first count and third plea, taken together, the defendants appeared to be innocent shippers of goods, dangerous in fact, but without any negligence on their parts. And that, therefore, the defendants should have judgment on the third plea. He agreed with the rest of the Court that the 4th plea was good, and the second count good; but he construed the 10th plea as not amounting to an allegation of notice, and therefore held it bad. *Brass* v. *Maitland*, 470

2. When the statement of the tonnage of a ship, in the charter-party, is not a warranty, but mere matter of description.

To an action for not loading a ship according to the terms of a charter-party, in which plaintiff was described as "of the ship A., of the measurement of 180 to 200 tons, or thereabouts," defendant pleaded that by the said charter-party the ship was *warranted* to be of the measurement of 180 tons to 200 tons, or thereabouts; and that the said ship was of a measurement greatly and unreasonably exceeding 200 tons, and was not of the measurement of 180 tons to 200 tons or thereabouts; whereupon defendant did not load.

Held, that the plea was not proved, inasmuch as the statement of tonnage in the charter-party was matter of description only, and did not amount to a warranty.

Where the Court of Exchequer Chamber, under sect. 41 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), confirms on appeal the decision of the Court below, as to granting, discharging, or making absolute a rule, the appellant is liable for the costs both of the appeal and of the proceedings below. *Barker* v. *Windle*, 675

3. i. Contract to proceed to and load a cargo

at a foreign port. Under what circumstances the breaking out of war avoids the contract to proceed to and load at a foreign port.

ii. What renunciation on behalf of one contracting party amounts to a dispensation by him.

Declaration stated that plaintiff and defendant agreed, by charter-party, that plaintiff's ship should proceed to Odessa, and there load from defendant's agent a cargo of specified goods, and therewith proceed home, a specified number of running days to be allowed for loading and unloading, and ten days for demurrage after the laying days: that the ship proceeded to Odessa; that the time for loading had elapsed; but defendant made default in loading.

Plea: that, after the vessel proceeded to Odessa, and before the alleged breach of contract, war was declared by the Queen against the Emperor of Russia, and war had ever since existed between this kingdom and Russia, of which plaintiff and defendant had notice before the alleged breach: that Odessa was part of the empire of Russia; and plaintiff and defendant were subjects of this kingdom, and not of Russia: that the ship was a registered British ship; and no license from the Queen could be obtained for loading the ship at Odessa: that defendant could not have procured a cargo or loaded the ship as agreed, nor could plaintiff have received such cargo, without trading or corresponding with the enemy. Issue on this plea.

It was proved that the master was directed by defendant to apply to defendant's agent M. at Odessa. War between England and Russia was first known at Odessa on 1st April, 1854, which was before the expiration of the running days. M., before 1st April, repeatedly told the master that he should be unable to procure a cargo, owing to a Russian prohibition; and he also endeavoured to persuade the master to quit Odessa without a cargo, upon certain terms inconsistent with the charter-party. The master continued to demand a cargo till after 1st April, and on a later day, but before the expiration of the running and demurrage days, left Odessa in ballast.

On appeal from the Court of Queen's Bench, held, by the Court of Exchequer Chamber, affirming the judgment of Q. B., that the plea was proved.

By charter-party, defendant contracted with plaintiff to load at Odessa a cargo, on board a ship of plaintiff then to proceed from a British port: if, before the ship's arriving at Constantinople, "war had commenced," and was continuing on her arrival there, a cargo was to be loaded there at a reduced rate of freight. Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that it appearing that both plaintiff and defendants were British subjects, this stipulation related to war between Russia, the State in possession of Odessa, and Great Britain, and not to war between Russia and Turkey, the State in possession of Constantinople. And therefore, war between Russia and Turkey having commenced before and continuing at the ship's arrival at Constantinople, but war between Russia and Great Britain not having commenced till afterwards, the alternative contract for loading at Constantinople did not take effect.

By charter-party, defendant agreed to load a cargo on plaintiff's ship at Odessa, certain running days to be allowed. To a count for not loading, which averred that, before the expiration of the running days, defendant dispensed with the ship remaining at Odessa, defendant pleaded that, before cause of action arose, war was declared between Russia and Great Britain, which rescinded the contract. It appeared that, after the ship had arrived, and before the declaration of war, defendant's agent had repeatedly told the master that he, the agent, had no cargo for the ship, and that the master had better go away: but the master continued to require a cargo till the declaration of war was known at Odessa, which was before the ship's laying days had expired. It further appeared that, in a conversation between plaintiff and defendant in England, after the declaration of war between England and Russia, defendant told plaintiff that he had determined not to load the ship, but to rely on the chapter of accidents, and that he had telegraphed to his agents at Odessa not to purchase a cargo.

Held, by the Court of Queen's Bench, that, assuming that the defendant's agent had on his part renounced the contract before the declaration of war, such renunciation, not being accepted by the master, constituted neither a dispensation nor cause of action.

On appeal to the Exchequer Chamber: the judgment was affirmed. i. *Avery* v. *Bowden*, 953. ii. *Reid* v. *Hoskins*, *ibid.*

III. Liability of shipowner.

1. Under ordinary bill of lading for damage caused by one party's goods to those of another.

This was a special case, in which the only question was whether the defendant, the shipowner, was answerable to the plaintiff, the shipper of goods, under the ordinary bill of lading, for damage sustained by those goods in consequence of the leakage of tar.

pentine from casks belonging to third parties, no negligence being imputed to the defendant. *Joseph Brown*, for the plaintiff, was not called upon to argue. *Manisty*, for the defendant, admitted he could not support the defence.

Per *Curiam*. (Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.) The case is too clear for argument.

Judgment for the plaintiff. *Gillespie* v. *Thompson*, 477, note (*b*)

2. For seaworthiness of ship. INSURANCE, I.

IV. Freight.

Who is entitled to freight, when the bill of lading is signed by the master as agent for the charterers, 232. BILL OF LADING, I. 1.

THIRDLY, the voyage.

V. What is commencement of.

Agreement, by charter-party, to pay a sum of money on a ship "being load and sailed." When the sailing is a condition precedent to payment: what is a sailing.

Defendant chartered a ship of T. from Sunderland to Barcelona: by the charter-party, half the freight was to be advanced to the master on his signing the bills of lading. T., being indebted to plaintiff, gave him an order on defendant, requiring defendant to pay to plaintiff, on the ship "being load and sailed, out of the advance," 73*l*. Defendant wrote, at the foot of the order, that he agreed to the above.

The vessel, being loaded and in a fit state for sailing, but the clearances not being completed nor the bills of lading signed, left Sunderland harbour, with the captain on board. She crossed the bar; and the captain returned to land, in order to get the papers completed, and sign the bills of lading: he signed them, and got the advance of freight from defendant, who deducted a sum to meet the 73*l*. The vessel stood off and on, waiting for the captain; but, it being found that she had been injured, she returned into Sunderland harbour to repair, the captain not having rejoined her, and did not afterwards sail.

Held, first: that the sailing of the vessel was a condition precedent to the liability of defendant to pay the 73*l*.

Secondly: that the vessel had not sailed, and the defendant therefore was not liable. *Hudson* v. *Bilton*, 565

VI. Master, when bound to communicate for orders.

Declaration alleged that defendant being master of a ship lying at Copenhagen, agreed with plaintiffs, by charter-party between them, that the ship should proceed to Nyland, and there load from plaintiff's factors a cargo of timber, and proceed therewith to a coal port, or a good and safe port in the Firth of Forth, or to London, or to a good and safe port on the East coast of Great Britain, as ordered, on signing bills of lading, or at Elsinore downwards (to wit, homewards), and deliver her cargo on being paid freight: that the ship did proceed to Nyland, and there load, and defendant signed a bill of lading for the cargo, in which it was stated (as the fact was) that the ship was bound for orders at Elsinore: that the ship arrived at Elsinore downwards: Yet defendant would not communicate with plaintiffs (to wit, in London) as he could have done, or wait a reasonable time at Elsinore downwards for orders; but, before a reasonable time had elapsed for plaintiffs to give or send orders to Elsinore, defendant took the ship with the cargo, without orders and against the will of plaintiffs, to Leith, a port in the Firth of Forth, where plaintiffs did not require the cargo to be, by which plaintiffs were put to expense in bringing the cargo from Leith to London.

Pleas. 1, as to defendant not communicating with plaintiffs, that defendant was not bound so to communicate: 2, as to the residue of declaration, that defendant waited a reasonable time at Elsinore downward for orders, but no orders were given or sent by plaintiffs to Elsinore within a reasonable time; wherefore defendant, after the lapse of a reasonable time for the receipt of orders, proceeded with the ship and cargo to Leith, being a good and safe port in the Firth of Forth, without any notice or knowledge that plaintiffs did not wish the ship and cargo to proceed there or did not require the cargo there.

On demurrer:

Held, that plaintiffs were not entitled to recover, defendant not being bound to communicate, and being justified, in the absence of orders, in taking the cargo to a place named in the charter-party.

By the Exchequer Chamber, affirming the judgment of Q. B. *Sieveking* v. *Maas*, 670

VII. Time Policy.

Liability of shipper as to seaworthiness of ship. See INSURANCE, I.

VIII. Insurance on profits on cargo. See INSURANCE, II.

IX. Insurance on ship.

1. What is a total loss, 422. INSURANCE, III. 1.

2. What repairs are chargeable to particular average, 779. INSURANCE, IV.

X. Action for collision: Merchant Shipping Act. How the question whether plaintiff's ship was "close hauled" is to be left to the jury, 771. MERCHANT SHIPPING ACT.

SHIPBUILDER.

See SHIP, I.

SHIPMENT.

See SHIP.

SHIPOWNER.

See SHIP.

SPECIAL JURY.

Right of sheriff to fees, under Common Law Procedure Act, 1852, 683. SHERIFF, I.

SPECIFIC PERFORMANCE.

Mandamus for. When it lies, 273. COMMON LAW PROCEDURE ACTS, I. 2.

STATUTES.

FIRST: Decisions on general public Acts.

I. 21 Jac. 1, c. 16. (Statute of Limitations), 506. STATUTE OF LIMITATIONS.

II. 29 Car. 2, c. 3. (Statute of Frauds.)

1. Sect. 4. Written memorandum signed by agent of party charged, 868. STATUTE OF FRAUDS, I.
2. Sect. 17. Acceptance of goods by vendee, 726. STATUTE OF FRAUDS, II. 1. 765, STAUTE OF FRAUDS, II. 2.

III. 2 G. 2, c. 22. (Debtors.)

Sect. 13. Set-off by executor, 976. SET-OFF, II.

IV. 11 G. 2, c. 19. (Landlords and Tenants.)

Sect. 14. Use and occupation, where demise not by deed, 986. DEED, III. 2.

V. 17 G. 2, c. 38. (Poor.)

Sect. 4. Respite of appeal against poor-rate for want of proper notice, 992. APPEAL, II.

VI. 41 G. 3, c. 23. (Poor.)

Sect. 6. Notice of appeal against poor-rate, 992. APPEAL, II.

VII. 58 G. 3, c. 45. (Church Building.)

Sect. 59. Power of churchwardens to borrow for repairs, 807. RATE, II. 2.

VIII. 3 G. 4, c. 126. (General Turnpike Act.)

Sect. 119. Measurement of distances, 350. TURNPIKE, I.

IX. 10 G. 4, c. 44. (Metropolitan Police.)

Sect. 4. Extent of police district, 715. JURISDICTION, IV. 1.

X. 1 & 2 W. 4, c. 22. (Metropolitan Hackney Carriage.)

Sects. 6, 20. Licenses to proprietors, 207. AGENT, I. 2.

XI. 1 & 2 W. 4, c. 37. (Truck Act.)

Interpretation of "artificer," 584. TRUCK ACT.

XII. 1 & 2 W. 4, c. 58. (Adverse Claims.)

Sect. 6. Costs of interpleader issue, 392. COSTS, I. 1.

XIII. 2 & 3 W. 4, c. 39. (Uniformity of Process.)

Right of attorney to lay venue in Middlesex, 982. TRIAL, I.

XIV. 5 & 6 W. 4, c. 50. (General Highway Act.)

1. Sects. 5, 6. Who are entitled to vote at election of surveyors, 999. HIGHWAY, I.
2. Sect. 27. Property liable to poor-rate to be assessed to highway-rate. *Ibid.*

XV. 5 & 6 W. 4, c. 63. (Weights and Measures.)

Sect. 17. Appointment of inspectors of weights and measures, 830. JURISDICTION, III. 3.

XVI. 5 & 6 W. 4, c. 76. (Municipal Corporation Reform.)

1. Sect. 32. Voting papers, 363. MUNICIPAL CORPORATION REFORM ACT, I.
2. Sect. 105. Jurisdiction of recorder as to appointments, 830. JURISDICTION, III. 3.
3. Sect. 142. Amendment of misdescription, 363. MUNICIPAL CORPORATION REFORM ACT, I.

XVII. 1 Vict. c. 55. (Execution of Civil Process.)

1. Sect. 2. Mileage fee to sheriff's officer, 718. SHERIFF, II.
2. Fees to sheriff for summoning special jury, 683. SHERIFF, I.

XVIII. 1 & 2 Vict. c. 110. (Creditor and Debtor.)

Sect. 59. Fraudulent assignment to creditors, 1. BANKRUPT AND INSOLVENT, III. 1.

XIX. 3 & 4 Vict. c. 86. (Church Discipline.)

Sects. 2, 9, 11, 24. Summons and hearing by bishop, 546. CHURCH DISCIPLINE ACT.

XX. 5 & 6 Vict. c. 98. (General Gaol Act.)

Sect. 18. Expenses of borough prisoners, 246. GAOL.

XXI. 6 & 7 Vict. c. 73. (Attorneys.)

Sect. 37. Taxation of bill of costs, 235. COSTS, II. 1.

XXII. 6 & 7 Vict. c. 86. (Metropolitan Hackney Carriage.)

1. Sects. 10, 21. Licenses to drivers.
2. Sects. 23, 24, 27, 28, 35. Responsibility of proprietor for driver, 207. AGENT, I. 2.

XXIII. 7 & 8 Vict. c. 84. (Building Act.)

1. Sect. 79. Complaints against surveyor, 137. BUILDING ACT.
2. Sect. 104. Order of justices not removable by certiorari, *ibid.*

XXIV. 7 & 8 Vict. c. 101. (Poor.)

1. Sects. 2, 3, 75. Summons to putative father of bastard, 822. BASTARDY.
2. Sects. 35, 39. Finality of auditor's decision, 408. CERTIORARI, III.

XXV. 7 & 8 Vict. c. 110. (Joint Stock Companies Registration.)

1. Sect. 55. Action for calls, 761. COMPANY, II. 3.

2. Sect. 68. Execution against shareholder, 1015. COMPANY, III. 1.

XXVI. 8 & 9 Vict. c. 16. (Companies Clauses Consolidation.)

Sects. 14, 20. Transfer of shares, 277. COMPANY, II. 1.

XXVII. 9 & 10 Vict. c. 66. (Poor.)

Sect. 4. Irremovability on ground of sickness, unless permanent, 919. POOR, I. 2.

XXVIII. 9 & 10 Vict. c. 95. (County Court.)

1. Sect. 33. Responsibility of high bailiff, 902. COUNTY COURT, II.

2. Sects. 121, 127. Replevin bond, 571. REPLEVIN, II.

XXIX. 10 & 11 Vict. c. 34. (Towns Improvement Clauses.)

Sect. 50. Abolition of turnpike tolls within limits of special Acts, 114. PUBLIC HEALTH ACT, I.

XXX. 10 & 11 Vict. c. 102 (County Court Extension), 902. COUNTY COURT, II.

XXXI. 11 & 12 Vict. c. 45. (Winding-up), 1015. COMPANY, III. 1.

XXXII. 11 & 12 Vict. c. 63. (Public Health.)

1. Sect. 10. Power of general board to make provisional orders, 114. PUBLIC HEALTH ACT, I.

2. Sect. 13. Election of new members of local board, 736. PUBLIC HEALTH ACT, II. 2.

3. Sects. 21, 30. Remuneration to person conducting first election of local board, 287. PUBLIC HEALTH ACT, II. 1.

4. Sects. 68, 87, 88, 117. Highway rates, 518. PUBLIC HEALTH ACT, II. 3.

XXXIII. 12 & 13 Vict. c. 92. (Prevention of Cruelty to Animals.)

Sect. 25. Appeal against conviction, 837. APPEAL, I. 1.

XXXIV. 12 & 13 Vict. c. 101 (County Court Extension), 902. COUNTY COURT, II.

XXXV. 12 & 13 Vict. c. 108 (Winding-up Amendment), 1015. COMPANY, III. 1.

XXXVI. 13 & 14 Vict. c. 61 (County Court Extension), 902. COUNTY COURT, II.

XXXVII. 13 & 14 Vict. c. 61. (County Court Extension.)

Sect. 12. Certificate of Judge, that action properly brought in superior court, 683. SHERIFF, I.

XXXVIII. 14 & 15 Vict. c. 52 (County Court Extension), 902. COUNTY COURT, II.

XXXIX. 14 & 15 Vict. c. 99. (Evidence Amendment.)

Sect. 6. Inspection, 380. COMMON LAW PROCEDURE ACTS, I. 4.

XL. 14 & 15 Vict. c. 103. (Board of Health.)

Confirmation of certain provisional orders of Board, 114. PUBLIC HEALTH ACT, I.

XLI. 15 & 16 Vict. c. 54. (County Court Extension.)

Sect. 4. Order for costs to plaintiff, when Judge satisfied that action properly brought in superior Court, 683. SHERIFF, I.

XLII. 15 & 16 Vict. c. 76. (Common Law Procedure, 1852.)

Sect. 112. Summons of special jury panel by sheriff, 683. SHERIFF, I.

XLIII. 15 & 16 Vict. c. 85. (Burial Act.)

1. Sect. 10. Summoning of vestry to decide as to burial ground, 225. VESTRY, I.

2. Sect. 52. Interpretation of "vestry." VESTRY, I.

XLIV. 16 & 17 Vict. c. 97. (Pauper Lunatics.)

1. Sect. 102. Expenses of maintenance of pauper lunatic, 919. POOR, I. 2.

2. Sect. 107. Grounds of adjudication of settlement and copy of order of maintenance to be sent to parish of settlement. Ibid.

3. Sect. 112. Amendment of statement of adjudication, &c. Ibid.

XLV. 16 & 17 Vict. c. 134. (Burial Amendment.)

Sect. 7. Summoning of vestry to decide as to burial ground, 225. VESTRY, I.

XLVI. 17 & 18 Vict. c. 36. (Prevention of Frauds on Creditors.)

Sects. 1, 7. Enrolment of bills of sale of personal chattels, 876. BANKRUPT AND INSOLVENT, III. 4.

XLVII. 17 & 18 Vict. c. 102. (Corrupt Practices Prevention.)

Sect. 2. Gift or promise by candidate to voter, 447. CORRUPT PRACTICES PREVENTION ACT.

XLVIII. 17 & 18 Vict. c. 104. (Merchant Shipping.)

Sects. 296, 298. Directions for vessels meeting, 771. MERCHANT SHIPPING ACT.

XLIX. 17 & 18 Vict. c. 125. (Common Law Procedure, 1854.)

1. Sect. 1. Trial by Judge without a jury, 338. COMMON LAW PROCEDURE ACTS, II.

2. Sect. 8. Remitter by Judge to arbitrator, 383. ARBITRATION, II. 2.

3. Sect. 11. Stay of proceedings, where previous agreement to refer, 1020. ARBITRATION, I.

4. Sect. 15. Enlargement of time by arbitrator, 719. ARBITRATION, II. 1.

5. Sect. 41. Appeal to Exch. Ch. against decision of Court below as to granting, discharging, or making absolute a rule, 675.

SHIP, II. 2. 681, COMMON LAW PROCEDURE ACTS, III.

6. Sect. 50. Inspection of documents, 380. COMMON LAW PROCEDURE ACTS, I. 4.

7. Sects. 51, 54, 55. Administration of Interrogatories, 462. COMMON LAW PROCEDURE ACTS, I. 5.

8. Sects. 50, 51, 53, 57. Costs of orders for interrogatories and inspection, 405. COSTS, I. 4.

9. Sect. 68. Claim of mandamus, 273. COMMON LAW PROCEDURE ACTS, I. 2.

L. 18 & 19 Vict. c. 120. (Metropolis Local Management.)

1. Sect. 16. Election of vestrymen and auditors, 289. RATE, II. 1.

2. Sect. 165. Rating of occupiers of houses, &c., other than land, where General Lighting Act in force, 1008. RATE, IV.

LI. 18 & 19 Vict. c. 121. (Nuisances Removal: England.)

Sect. 22. Assessment of parties benefited, 395. RATE, V.

SECONDLY: Decisions on local and personal public Acts.

LII. 52 G. 3, c. cxcv. (Regent's Canal Company.)

Sect. 101. Rateability of property of company, 852. RATE, I. 2.

LIII. 59 G. 3, c. cxi. (Regent's Canal Navigation and Grand Junction Waterworks), 852. RATE, I. 2.

LIV 1 & 2 G. 4, c. cii. (Essex Gaol.)

Sects. 28, 29. Committal and maintenance of borough prisoners, 246. GAOL.

LV. 5 G. 4, c. lxxxiii. (Whiteparish, &c., and Southampton Turnpike Road.)

Sect. 15. No tolls to be taken within three miles of Southampton, 35. TURNPIKE, I.

LVI. 9 G. 4, c. xxvi. (Stalybridge Improvement.)

Sect. 181. Appeal against rate or order under the Act, 218. APPEAL, II. 2.

LVII, 9 G. 4, c. xxvii. (North Shields Improvement.)

Sect. 27. That part of North Shields and Newcastle road, not within North Shields, not repairable under Act, 114. PUBLIC HEALTH ACT, I.

LVIII. 11 G. 4, c. xv. (Liverpool Paving and Sewerage), 704. RATE, I. 1.

LIX. 1 & 2 W. 4, c. lxxii. (North Shields and Newcastle Turnpike Road.)

Sect. 18. What parts of road repairable under Act, 114. PUBLIC HEALTH ACT, I.

LX. 2 & 3 W. 4, c. cx. (General Cemetery Company.)

Sects, 90, 91, 96, 97. Transfer of shares, 415. COMPANY, II. 2.

LXI. 5 & 6 W. 4, c. cvii. (Great Western Railway.)

Sect. 171. Charges for carriage, 77. CARRIER.

LXII. 5 & 6 Vict. c. xxvi. (Liverpool Sewerage and drainage) 704. RATE, I. 1.

LXIII. 6 & 7 Vict. c. lxxv. (Liverpool Paving and Sewerage), 704. RATE, I. 1.

LXIV. 7 & 8 Vict. c. iii. (Great Western Railway.) Sects. 50, 51. Charges for carriage, and contracts for collection, of goods, 77. CARRIER.

LXV. 8 & 9 Vict. c. lxix. (Southwark and Vauxhall Water Company), 1008.) RATE, IV.

LXVI. 9 & 10 Vict. c. cxxvii. (Liverpool Sanatory Act.)

1. Sect. 136–139. Powers of Commissioners under previous Acts vested in corporation, 704. RATE, I. 1.

2. Sect. 154. Water rates. Ibid.

LXVII. 10 & 11 Vict. c. cxxvi. (Great Western Railway.)

Sects. 47-51, 53, Charges for carriage, 77. CARRIER.

LXVIII. 10 & 11 Vict. c. cclxi. (Liverpool Corporation Waterworks.)

Sects. 122, 125–128 (Water rates), 704. RATE, I. 1.

LXIX. 13 & 14 Vict. c. lxxx. (Liverpool Corporation Waterworks Amendment), 704, RATE, I. 1.

LXX. 15 & 16 Vict. c. xlvii. (Liverpool Corporation Waterworks further Amendment), 704. RATE, I. 1.

THIRDLY: Decisions on private Acts.

LXXI. 5 G. 1, c. 19. (To make Sunderland a distinct parish.) Triennial election of vestry, 255. VESTRY, I.

LXXII. 9 G. 3, c. 101. (Redworth Enclosure.)

Right of allottee of surface to support, 593. MINE, I.

LXXIII. 41 G. 3, c. 14. (West Bromwich Enclosure.)

Right of allottee of surface to support, 643. MINE, II.

STATUTE OF FRAUDS.

(29 CAR. 2, c. 3.)

I. Sect. 4. What is a sufficient written ratification by a principal of the act of his agent to constitute a signed memorandum.

Defendant employed R., as his agent, to agree with plaintiff for the purchase of plaintiff's interest in a leasehold house. Plaintiff also held a stable under a demise distinct from that under which he held the house.

Defendant did not authorize R. to purchase the stable; and R. represented to defendant that he had purchased the lease of the house only; but in fact R. had taken from plaintiff an agreement in writing for the purchase of both. Afterwards, on plaintiff stating to defendant that such was the agreement, and requiring defendant to take the stable, defendant wrote and signed a letter to plaintiff, stating that defendant did not know what R. had agreed to, but must support him in all he had done for defendant. Held that this was a ratification of R.'s agreement, whatever it might be, sufficient to constitute with it a signed memorandum, under sect. 4 of the Statute of Frauds (29 C. 2, c. 3) to charge defendant with a contract to take the stable. Per Lord Campbell, C. J., Wightman and Erle, Js., Crompton, J., not concurring. *Fitzmaurice* v. *Bayley*, 868

II. Sect. 17.

1. Acceptance within the statute, by an act of vendee implying ownership.

Plaintiff sold a horse to defendant, by verbal agreement, for a sum above 10*l*. The bargain was for immediate delivery; but plaintiff requested defendant to lend the horse to him, plaintiff, and, by defendant's consent, plaintiff kept the horse. Afterwards defendant refused to take the horse.

The jury, on the question being put them, found that the bargain was complete before the arrangement as to the loan took place.

Held, that there was an acceptance of the horse by defendant within the exception of sect. 17 of the Statute of Frauds (29 C. 2, c. 3). *Marvin* v. *Wallis*, 726

2. Not a sufficient acceptance, where bargain previously disaffirmed by vendor.

It was verbally agreed, between the owner of goods and a person who was in possession of those goods as his tenant, that the tenant might, if he pleased, at the termination of his tenancy, purchase the goods for a sum exceeding 10*l*., but was not to take them till the money was paid. At the expiration of the tenancy the buyer tendered the price; but it was refused by the vendor, who denied the validity of the bargain. After this the buyer proceeded to take away the goods; the vendor prevented him, and took possession of them. In an action of trover by the buyer against the vendor,

Held, that on these facts there was no evidence to go to the jury of an acceptance and actual receipt to bind the bargain; as at the time when the buyer took to the goods as owner the parol contract had been already disaffirmed by the vendor. *Semble*, that, if the buyer had been authorized by the contract to take the goods as owner, and had, without any fresh authority from the vendor, taken to them as owner before the contract was disaffirmed, it would have bound the contract, not only in favour of the vendor, but also in favour of the buyer. *Taylor* v. *Wakefield*, 765

STATUTE OF LIMITATIONS.

(21 Jac. 1, c. 16.)

Acceptance of a bill of exchange on account; when evidence of a fresh promise.

A creditor, who had, more than six years before the action, supplied ships' stores on seven separate occasions to the debtor, amounting in the aggregate to more than 300*l*., within six years, asked his debtor for money. The debtor answered that he had not looked into his accounts, but supposed the balance due to be between 90*l*. and 100*l*., but he had not cash. Being pressed, he accepted a draft at four months for 60*l*., which he did, taking an acknowledgment that he had given the acceptance on account. It was proved by other evidence that the amount unpaid for the ships' stores was 95*l*.; but the different accounts were never balanced or ascertained between the creditor and debtor.

Held, that evidence of the giving of the acceptance under these circumstances, was evidence to go to the jury of a payment on account of all the debts, so as to be evidence of a fresh promise to pay what was due, sufficient to take the whole out of the Statute of Limitations. *Walker* v. *Butler*, 506

STAY OF PROCEEDINGS.

Under what circumstances the Court will order a stay of proceedings, on the ground of a previous agreement to refer to arbitration, 1020. Arbitration, I.

STOWAGE.

I. Of dangerous goods on board a general ship. Liability of shipper, 470. Ship, II. 1.

II. Liability of shipowner for damage caused by goods of one party to goods of another, 477. Ship, III. 1.

STRANDING.

Expenses of towing ship to port for repair, after cargo in safety, by whom payable, 779. Insurance, IV.

SUBMISSION.

Agreement to submit to arbitration, when a ground for staying proceedings in an action subsequently brought, 1020. Arbitration, I.

SUMMONS IN BASTARDY.

Bastardy.

SUPERIOR COURTS.

Certificate of Judge that the action was one proper to be tried there; at what time it may be given, 683. SHERIFF, I.

SUPPORT.

Rights of owners of surface to. See MINE.

SURETY.

Bond of indemnity to high bailiff by sureties of bailiff of County Court. Liability of sureties, how affected by the recent County Court Acts, 902. COUNTY COURT, II.

SURFACE.

Owners of, their right to support. See MINE.

SURVEYOR.

I. Under Building Act. Order of justices to dismiss, when bad for want of jurisdiction, 137. BUILDING ACT.

II. Of highways; who are entitled to vote at the election of them, 999. HIGHWAY, I.

TAIL.

See DEVISE, II.

TAXATION.

See COSTS, II.

TENANCY.

See LANDLORD AND TENANT.

TERM.

I. Meaning of, in a lease for years. CONDITION PRECEDENT, I.

II. Outstanding term. See DEVISE, I.

TOLLS.

I. How distances are to be measured under Turnpike Acts, 350. TURNPIKE, I.

II. Provisional order of Board of Health, incorporating clause of Towns Improvement Clauses Act, abolishing turnpike tolls in a certain district; how far invalid, 114. PUBLIC HEALTH ACT, I.

TOTAL LOSS.

See INSURANCE, III.

TOWNS IMPROVEMENT CLAUSES ACT.

(10 & 11 VICT. c. 34.)

Provisional order of Board of Health, incorporating sect. 50; how far invalid, 114. PUBLIC HEALTH ACT, I.

TRADE.

I. Restraint of. Combination of millowners, 47. CONTRACT, VII. 1.

II. Public trade; covenant by lessee not to carry on. What is a breach, 387. LANDLORD AND TENANT, VI.

TRANSFER.

Of shares. See COMPANY, II.

TRAVELLING EXPENSES.

Of voter. Promise by candidate to pay, when it is illegal, 447. CORRUPT PRACTICES PREVENTION ACT.

TRIAL.

I. Venue. Right of practising attorney to lay it in Middlesex.

A practising attorney, suing in person, still has an absolute privilege to lay and retain the venue in Middlesex. The Court refused to change the venue, though the cause of action arose elsewhere, and though the balance of convenience was against the trial in Middlesex. *Grace* v. *Wilmer*, 983

II. Notice of. When a defendant may not avail himself of a verbal inaccuracy.

Notice of trial, delivered and dated on a day in Easter Term, 1856, was (owing to an amendment in the pleadings after issue and notice had been prepared, and an incomplete alteration of the notice in consequence) given for the second sittings in Easter Term "next;" and the case was tried and a verdict obtained against the defendant, in his absence, at the second sittings in Easter Term, 1856. The Court, believing that in fact the defendant had not been misled, refused to set aside the verdict, though the defendant swore that he was misled, and also to merits. *Fenn* v. *Green*, 656.

III. Trial by judge, without a jury, under Common Law Procedure Act, 1854. When written consent of parties not necessary, 338. COMMON LAW PROCEDURE ACTS, II.

TROVER.

When it lies.

I. By assignees for conversion by a third party of insolvent's property before insolvency, I. BANKRUPT AND INSOLVENT, III. 1.

II. To recover plaintiff's goods delivered to defendant by plaintiff's bailee, bonâ fide, with intent to give a lien against plaintiff, which did not exist, 842. REPLEVIN, I.

TRUCK ACT.

(1 & 2 W. 4, c. 37.)

What is an artificer within the meaning of the Act.

By an agreement with a mine owner, two

persons engaged as "butty colliers." It was found, as a fact, that butty colliers get the produce of the mine at so much a yard; that they employ others under them to increase the quantity; but that they must work personally, and are treated as workmen.

Held that, on this finding, butty colliers were artificers within the Truck Act, stat. 1 & 2 W. 4, c. 37: the distinction between contractors and artificers depending on the fact whether by the engagement they were labourers. *Bowers* v. *Lovekin*, 584

TRUSTEES.

Legal estate in, under a devise. DEVISE, I.

TURNPIKE.

I. How distances are to be measured under Turnpike Acts.

By a turnpike Act, the trustees were authorised to erect toll bars, but not within three miles of B.

Held, that the distance from B. must be measured on the straight line horizontal plane; the circumstance that the Act was a turnpike Act not being sufficient to indicate an intention that it should be measured along the road. *Jewel* v. *Stead*, 350

II. Provisional order of the Board of Health, incorporating clause of Towns Improvement Clauses Act, abolishing turnpike tolls in a certain district; how far invalid, 114. PUBLIC HEALTH ACT, I.

UNDERWRITERS.

See INSURANCE.

UNIFORMITY OF PROCESS ACT.

(2 & 3 W. 4, c. 39.)

Does not destroy right of a practising attorney to lay venue in Middlesex, 982. TRIAL, I.

USE AND OCCUPATION.

Deed of demise, delivered as an escrow. Tenant liable for use and occupation, 986. DEED, III. 2.

VARIANCE.

In the tonnage of a ship, from her tonnage as set down in the charter-party; when it does not amount to a breach of warranty, 675. SHIP, II. 2.

VENDOR AND VENDEE.

I. Vendee of an estate at a public auction, precluded from repudiating the bargain on a ground of objection specifically excluded by the conditions of sale, 659. CONTRACT, VII. 5.

II. What ratification by a principal of the act of his agent amounts to a signed memorandum within sect. 4 of the Statute of Frauds, 868. STATUTE OF FRAUDS, I.

III. Acceptance by vendee, within sect. 17 of Statute of Frauds, by an act implying ownership, 726. STATUTE OF FRAUDS, II. 1.

IV. Acceptance by vendee, when insufficient, the contract having been previously disaffirmed by vendor, 765. STATUTE OF FRAUDS, II. 2.

V. Sale of shares. See COMPANY, II.

VENUE.

Right of practising attorney to lay venue in Middlesex, 982. TRIAL, I.

VESTRY.

I. What is a vestry within the meaning of sect. 52 of stat. 15 & 16 Vict. c. 85. BURIAL OF DEAD.

By a private act (5 G. 1, c. 19), constituting a township a distinct parish, a vestry was to be triennially elected, for the preserving better order in the new parish, for better raising and ascertaining all taxes and assessments for buying bells for the church, finishing it and keeping it in repair, defraying the expenses of the churchwardens concerning the same, providing stipends for rector and parish clerk, and salary for scavenger, and making orders and by-laws, and keeping and maintaining good rules and order in and about the church. The statute gave the vestry power and authority to appoint and remove scavengers, to make by-laws and rules relating to the church, to rate occupiers in the parish for defraying the expenses of buying bells, finishing the church, raising stipends for rector and parish clerk, and salary for scavenger. The statute also subjected the inhabitants to the customs of the parish of which the township had formed part for the choice of churchwardens, overseers, and other parish officers: and the vestry of the new parish, in pursuance of such custom, chose the churchwardens (one nominated by the rector), nominated the overseers and parish constables (who were afterwards appointed and sworn in, respectively, by the justices), and appointed inspectors of weights and measures, and laid rates for the purposes mentioned in the Act.

Held, that such vestry was within the meaning of sect. 52 of stat. 15 & 16 Vict. c. 85, as a vestry "elected under the provisions of any local Act of Parliament for the government of any parish by vestries;" and must therefore, on the requisition of rate-payers under sect. 10 (extended by stat. 16 & 17 Vict. c. 134, s. 7), be convened for the special purpose of determining whether a burial ground

should be provided, under the Act for the parish. *Regina* v. *Peters*, 225

II. Election of vestrymen under stat. 18 & 19 Vict. c. 120. Action for maliciously rejecting plaintiff's vote: plea that a rate was then unpaid by plaintiff: replication that rate was void, &c., 289. RATE, II. 1.

III. Resolution of vestry to borrow money for repairs of church, under Church Building Act. What is a "borrowing" within the Act, 807. RATE, II. 2.

VOTE.

I. At a parliamentary election. When a promise by candidate to pay travelling expenses of voter is illegal, 447. CORRUPT PRACTICES PREVENTION ACT.

II. Action for maliciously rejecting a vote at an election of vestrymen under stat. 18 & 19 Vict. c. 120. Plea that a rate was then unpaid by plaintiff; replication that rate was void, &c., 289. RATE, II. 1.

VOTING PAPER.

Under Municipal Corporation Reform Act. What misdescriptions are curable under sect. 142. What is a sufficient description of property, 363. MUNICIPAL CORPORATION REFORM ACT, I.

WAR.

Under what circumstances the breaking out of war avoids a contract to load at a foreign port, 953. SHIP, II. 3.

WARRANT OF ATTORNEY.

When void within stat. 1 & 2 Vict. c. 110, s. 59; 1. BANKRUPT AND INSOLVENT, III. 1.

WARRANTY.

What statements do not amount to a warranty.

I. Statement of tonnage, in a charter-party, 675. SHIP, II. 2.

II. Of seaworthiness, in a time policy, 172, 192. INSURANCE, I. 1, 3.

WATER COMPANY.

Rateability of. See RATE, I. 1, IV.

WEIGHTS AND MEASURES.

Inspector of, for a district. When the appointment is in the Quarter Sessions, 830. JURISDICTION, III. 3.

WILL.

DEVISE.

WINDING-UP ACTS.

(11 & 12 VICT. c. 45, and 12 & 13 VICT. c. 108).

Effect of, as to suspension of execution against an individual shareholder, 1015. COMPANY, III. 1.

WORKMEN.

I. Combination by millowners, to employ workmen according to certain rules; void for restraint of trade, 47. CONTRACT, VII. 1.

II. What is an artificer within the meaning of the Truck Act, 584. TRUCK ACT.

WRECK.

See INSURANCE.

YEARLY TENANCY.

Deed of demise for a term, delivered as an escrow. Lessee liable as yearly tenant, 966. DEED, III. 2.

END OF VOL. VI.

Stanford Law Library
3 6105 063 125 749